Money
1100 29. 80. acq

12-322

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~598.~~ 345 86

JAMES S. CLARK AND EDWARD FULTON, PARTNERS, AS J. S. CLARK AND COMPANY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED NOVEMBER 7, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 598.

JAMES S. CLARK AND EDWARD FULTON, PARTNERS, AS J. S. CLARK AND COMPANY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition	1	1
Traverse	9	5
Plea of limitation	10	5
Findings of fact and conclusion of law	11	5
Opinion of the court	14	8
Request of claimants for additional findings of fact and rulings thereon	15	9
Final judgment	18	9
Application for and allowance of appeal	19	10
Certificate	20	10

1 I.—*Petition.*—*Filed April* 26, 1873.

In the United States Court of Claims, December term, A. D. 1873:

JAMES S. CLARK AND EDWARD FULTON, PARTNERS under the name and style of J. S. Clark, & Co.,
vs.
THE UNITED STATES.
No. 7160.

To the honorable the chief-justice and judges of the United States Court of Claims:

Your petitioner, James S. Clark and Edward Fulton, partners under the name and style of "J. S. Clark & Co.," residents of the city of New Orleans, and State of Louisiana, respectfully represent:

1st. That they and each of them, are citizens of the United States, and that they have at all times borne true allegiance to the government thereof, and that they have not, nor has either of them, ever voluntarily given any aid, comfort, countenance or encouragement to rebellion against the said government.

2d. That on the 26th day of October, 1864, your petitioners received from the Secretary of the Treasury, with the sanction and approval of the President of the United States, authority and permission to transport from a point on the Mississippi River, near Bayou Sara, in the State of Louisiana, to the city of New Orleans in the said State,

2 three thousand four hundred and thirty-five bales of cotton, which your petitioners had previous to that time purchased or agreed to purchase; and your petitioners attach hereto a copy of the said permit and authority with the approval of the President thereon endorsed, and also the military and naval orders endorsed thereon, and marked the same "Exhibit A," and pray that the same may be taken as a part of this petition.

3d. That some time in the month of December, A. D. 1864, your petitioners acting under the authority and protection of the said permit, as well as under the executive, military and naval orders endorsed thereon, did bring to the said city of New Orleans, on board of the steamer Sciota, three hundred and thirty-six bales of cotton; and your petitioners further state, that immediately upon the arrival of the said cotton at New Orleans aforesaid, the same with the steamer upon which the same had been transported, was unlawfully seized and detained by one Hiram Robinson, a person in the military service of the United States, acting or assuming to act, as provost martial under the command and authority of Major-General S. A. Hurlburt; and your petitioners further state the said cotton and steamer were kept under seizure and detained from the possession of your petitioners for the period of five days, during which time the value of the said cotton depreciated in the market, and your petitioners sustained a loss thereon by reason of the said seizure, amounting to fifty-seven thousand dollars.

4th. Your petitioners further state that the said provost marshal by whom the said cotton and steamer were seized and detained, demanded from your petitioners, as the condition upon which he would release the said cotton and steamer, the payment by your petitioners to the said provost marshal of the sum of ten thousand dollars; and your petitioners aver, that in order to secure the release and discharge of the

3 said cotton and the said steamer, so as aforesaid unlawfully seized and detained by the said provost marshal, your petitioners

paid to the said provost marshal the said sum of ten thousand dollars, and that immediately upon such payment the said cotton and the said steamer were released to your petitioners; and your petitioners further aver, that neither the said cotton nor the said steamer were subject to seizure by reason of any acts done or committed by your petitioners, or either of them, in bringing the said cotton to the said city of New Orleans, nor was the said cotton and the said steamer liable to seizure and detention for any other reason or cause whatever; and your petitioners further aver, that the acts of the said provost marshal in seizing and detaining the said cotton and the said steamer, were in all things unauthorized and unlawful.

5th. Your petitioners further represent that subsequent to the seizure of the said cotton and the said steamer, as well as subsequent to the release of the same by the said provost marshal, a commission was appointed either by the President of the United States or the Secretary of War, to investigate and report in regard to the official acts and conduct of the said provost-marshal, which commission was composed of Major-General W. F. Smith and the honorable James T. Brady; and your petitioners further aver that the said commission, in the course of their investigation into the official acts and conduct of the said provost-marshal, did seize and take possession of the said sum of ten thousand dollars, so as aforesaid exacted and extorted from your petitioners by the said provost-marshal; and your petitioners further aver that the said commission, subsequent to the time the said sum of ten thousand dollars came into its possession, transmitted the same to the Secretary of War; and your petitioners aver that the said sum of ten thousand dollars, so as aforesaid extorted from your petitioners by the said provost-marshal, and by the said commission transmitted to the
4 Secretary of War, was, by the said Secretary of War, some time in the month of June, A. D. 1869, transmitted to the Secretary of the Treasury of the United States, and the said sum of ten thousand dollars was by the said Secretary of the Treasury paid into the Treasury of the United States.

5th. Your petitioners further state that while the said sum of ten thousand dollars was retained in the possession of the Secretary of War, your petitioners applied to have the same restored to them, but that the Secretary of War declined to take any action upon such application, and transmitted the said sum of ten thousand dollars to the Secretary of the Treasury, in order that the same might be covered into the Treasury and converted to the use of the United States.

7th. Your petitioners further represent, and so state the fact to be, that the claim herein stated and set forth against the United States is upon an implied contract with the United States, resulting from the conversion by the United States to its own use of the said sum of ten thousand dollars, so as aforesaid illegally and wrongfully extorted and exacted from your petitioners by the said provost-marshal; and that such implied contract became complete only upon the payment of the said sum of ten thousand dollars into the Treasury of the United States at the time hereinbefore stated and set forth, and that the claim hereinbefore stated and set forth at that time accrued against the United States, and became cognizable in this court.

Your petitioners, therefore, by reason of the premises, pray judgment against the United States for the said sum of ten thousand dollars.

JOHN J. WEED,
Attorney for Claimants.

STATE OF LOUISIANA,
Parish of Orleans, ss:

James S. Clark, one of the claimants named in the foregoing
5 petition, being duly sworn, on his oath states that no assignment or transfer of the said claim, or any part thereof or any interest therein, has been made; that the said claimants are justly entitled to the amount in the said petition*er* claimed from the United States, after deducting all just credits and offsets, and that he believes the facts as stated in the said petition are true.

JA'S S. CLARK.

Sworn to and subscribed before me this 21 April, 1873.
[SEAL.] F. B. VINOT,
U. S. Commissioner.

P. O. address of claimant, New Orleans, La.
P. O. address of claimant's attorney, Washington, D. C.

TREASURY DEPARTMENT, *October* 26, 1864.

J. S. Clark and E. Fulton allege that prior to the second day of July, 1864, under authority of Geo. S. Denison, special agent of the Treasury Department at New Orleans, they purchased in the parishes of East and West Feliciana, in the State of Louisiana, 3,435 bales of cotton, upon which they advanced the sum of $123,200 in United States currency, as part payment for the same, and became liable to pay the balance of the purchase money.

That after purchasing and becoming owners of said cotton, and while in the act of moving the same to market for sale, they ascertained tha by the passage of the act of July 2, 1864, they were prevented from proceeding with the shipment of said cotton or in any way interfering with the same, and it now remains at the points above named, exposed to the depredations of guerillas. They therefore ask that authority may be granted them to complete the transaction commenced and conducted thus far under the prescribed rules and regulations of the Treasury Department.

6 After full examination, and in view of the fact that the loyalty of the parties is not questioned, and that there are no adverse claimants to said cotton known to the department, authority is hereby given to the said J. S. Clark and E. Fulton to transport by way of New Orleans (where all government fees and dues shall be paid before shipment therefrom), the cotton in question, provided they shall first present to the acting collector of customs, at New Orleans, the original authorities or permits under which they acted, or copies thereof certified by the officer with whom they are filed, with proof to his satisfaction that the cotton was actually purchased in good faith, under and by virtue of said authorities, and payment made and liabilities incurred as alleged; and provided further, that the said J. S. Clark and E. Fulton shall first execute to the satisfaction of the said acting collector at New Orleans, a bond with sufficient security in the penalty of $250,000, conditioned that all fees and taxes, in any way due or accruing to the Government of the United States from said cotton, shall be paid on its arrival at New Orleans, and any cotton transported or attempted to be transported under this authority without the original permits or authorities, or certified copies thereof and proof herein required, shall be seized and proceeded against for forfeiture and condemnation to the United States.

The acting collector at New Orleans shall record and file, in his office,

a copy of this authority, and deliver the original to the said J. S. Clark and E. Fulton, after endorsing upon it his certificate, attested by his official seal, that the required bond has been duly executed and delivered.

The conditions herein stipulated having been complied with, the cotton moving under this authority or under permits given in pursuance hereof, will be allowed to be transported without hindrance or delay.

7 The leave hereby granted is confined to so much of said cotton as had been actually paid for, or said parties had become legally liable to pay for, under and by virtue of permits properly issued by authority of this department, prior to said second day of July, 1864, and the power to revoke the authority hereby granted at any time, should satisfactory cause appear, is reserved to this department.

W. P. FESSENDEN,
Secretary of the Treasury.

EXECUTIVE MANSION, *October* 26, 1864.

The Secretary of the Treasury having by the terms of and upon the conditions contained in the foregoing paper by him signed, directed that J. S. Clark and E. Fulton be allowed to transport from certain localities in the State of Louisiana, to markets in the loyal States or elsewhere, 3,435 bales of cotton owned by them in said State, and that permits be given them for that purpose by the acting collector of customs at New Orleans:

It is ordered that all cotton moving in compliance with such direction of the Secretary of the Treasury, or permits granted in pursuance thereof, shall be free from seizure or detention by any officer of the government, and commandants of military departments, districts, posts, and detachments, naval stations, gunboats, flotillas, and fleets will observe this order, and give the said J. S. Clark and E. Fulton, their agents and transports, proper facilities and passes for the purpose of getting said cotton through the lines, and safe conduct within our lines while the same is moving in strict compliance with the directions of the Secretary of the Treasury and permits above referred to.

ABRAHAM LINCOLN.

8 CUSTOM-HOUSE, COLLECTOR'S OFFICE,
New Orleans, L'a, November 16, 1864.

I certify that J. S. Clark and E. Fulton have delivered to me a bond duly executed, with proper and sufficient sureties, in the sum of $250,000 as required by the foregoing authority from the Secretary of the Treasury.

GEORGE S. DENISON,
Sp. Ag't of Treasury Department, and Acting Collector of Customs.

HEADQ'RS DEP'T GULF, *December* 23, 1864.

The above executive order will be obeyed and respected by all military officers within this department.

S. A. HURLBURT,
M. G. C.

Copy of endorsements.

U. S. S. CHOCTAW, *January* 1, 1865.

All officers on the 2d division will respect the within order.

J'N. J. CORNWELL,
L'a Comm'g, Comm'g 2d District, Miss. Squadron.

U. S. SHIP LAFAYETTE, *January* 4, 1865.

All officers under my command in the 3d and 4th districts will respect the within orders.

JA'S P. FOSTER,
Comm'g 3d and 4th Divisions, Miss. Squadron.

9 II.—*Traverse.*—*Filed July* 8, 1873.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimants herein; and, not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimants in the sum of ten thousand dollars, says that they are not indebted to the said claimants in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, denies the said allegation.

JOHN GOFORTH,
Assistant Attorney-General.

10 III.—*Plea of limitation.*—*Filed July* 30, 1873.

Now come the defendants, by their Attorney-General, and say that the claimants herein should not further have or maintain their suit against the defendants, for the reason that the petition of the claimants was not filed in this court nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore, the defendants ask judgment, &c.

JOHN GOFORTH,
Assistant Attorney-General.

11 IV.—*Findings of fact and conclusion of law.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. On the 26th of October, 1864, the Secretary of the Treasury signed and delivered to the claimants the paper of that date annexed to the petition; and on the same day Abraham Lincoln, President of the United States, signed the order of that date accompanying said paper, and also annexed to the petition.

II. On the 16th of November, 1864, the claimants delivered to George S. Denison, the acting collector of customs at New Orleans, a bond, duly executed, with proper and sufficient sureties, in the sum of $250,000, as required by the aforesaid paper signed by the Secretary of the Treasury.

III. On the 13th of December, 1864, on the United States ship Choctaw, off Bayou Sara, La., John J. Cornwell, lieutenant-commander of the United States Navy, commanding the second and third districts of the Mississippi River, issued the following order, addressed to naval officers between Bayou Sara and New Orleans: "Pass the steamer Sciota, Captain Owesney, with a cargo of three hundred and thirty-six (336) bales of cotton, to New Orleans, without molestation. The cotton was taken on board at Bayou Sara by my consent."

IV. On the arrival of the steamer Sciota at New Orleans, she and her cargo were seized by the United States military police, under the control of Col. Harai Robinson, then acting as provost-marshal-general of the Department of the Gulf, of which department Gen. S. A. Hurlbut was then in command.

V. After the seizure of the Sciota and her cargo, General Hurlbut issued a special order, stating that by direction of the major-general commanding the Military Division west of the Mississippi, the cotton brought by the steamer Sciota should be disposed of as follows: A certain number of bales (number not shown) to be given to the claimants; the remainder to be turned over to O. N. Cutler, the United States purchasing-agent; and that the claimants should give bonds for their appearance when required. On said Robinson's receipt of said order he sent for the claimants, and they appeared before him and gave bonds; at which time they did not exhibit to him any papers in relation to the shipment of cotton. It was not the province of said Robinson to have anything to do with the receiving or disposing of the cotton.

VI. On or about the 21st of December, 1864, in the evening, after office-hours, the claimants called on the said Robinson at his dwelling, and showed him the papers aforesaid, dated October 26, 1864, signed by the Secretary of the Treasury and the President, which the said Robinson had not before seen or had any knowledge of, and the claimants asked him what he thought of that permit. He told them he thought it was a sweeping one; that it covered all ground. They answered that, notwithstanding that permit, the cotton aboard the Sciota had been seized and detained, and themselves put under bond. He asked how that could be. They answered that the permit was of
12 no account unless signed by the major-general commanding the department. He asked them if they had presented it to the general commanding. They said yes, and it had been refused. He then advised them to go to General Canby, who commanded the Military Division West of the Mississippi, and show the permit to him. They replied, "You know that is useless by the very order which put us under bond; it states by order of the general commanding the Military Division West of the Mississippi." They further said they were satisfied that it could not be done except by money; that money was wanted; and that they were willing to pay most liberally to have it signed; that that would cover and release they cotton. They said they would pay ten thousand dollars to have that Presidential permit indorsed and their cotton released. He then told them to leave the permit with him and he would see about it.

The next day the said Robinson took the permit to General Hurlbut, and told him the parties wished to have it signed by him. General Hurlbut replied, "Yes, I have seen this permit before. I have refused to sign it." Robinson then said, "General, these men have offered a large amount of money to get this permit indorsed; there's money in it." Hurlbut perused the permit carefully, and said, "You must take that to M'r Denison, and have him certify that the proper bonds have been filed by these parties, Clark and Fulton." Robinson took the permit to said Denison, and advised him of the wishes of General Hurlbut. Denison then indorsed on the permit the following certificate:

"CUSTOM-HOUSE, COLLECTOR'S OFFICE,
"*New Orleans, La., November* 16, 1864.

"I certify that J. S. Clark and E. Fulton have delivered to me a bond, duly executed, with proper and sufficient sureties, in the sum of

$250,000, as required by the foregoing authority from the Secretary of the Treasury.

[SEAL.] "GEO. S. DENISON,

"*Sp. Ag't of Treasury Dep't & Act'g Collector of Customs.*"

Robinson then took the permit back to Hurlbut, who placed on it the following indorsement:

"HEADQ'RS DEP'T GULF, *Dec.* 23*d*, 1864.

"The above executive order will be obeyed & respected by all military officers within this department.

"S. A. HURLBUT, *M. Ge.*"

That day, or the next, the claimants handed Robinson, at his dwelling, $5,000; and subsequently, on the same day, he handed that money back to them, stating to them that it did not suit him to receive it in that manner. They asked him how he would receive it. He told them he would receive it through Denison, the collector of the port. The next morning Denison handed him an envelope with $5,000 in it, out of which Robinson took $2,000 or $3,000 and gave it to General Hurlbut, and laid away the balance in the provost-marshal-general's office.

After that money was given to Robinson, the claimant Clark saw him again, and said to him, "Now I have the permit indorsed, see if you can get my cotton released; see if General Hurlbut will give an order releasing or justifying the release of my cotton. Robinson then saw Hurlbut and stated the facts to him, and Hurlbut then wrote the following paper:

13 "HEADQUARTERS DEPARTMENT OF THE GULF,

"*New Orleans, Dec.* 24, 1864.

"Pursuant to executive order of his exc'y the President of the United States, J. S. Clark & E. Fulton are permitted to bring the number of bales of cotton in said order mentioned from Ratcliff's Landing, on the Miss. River, 25 miles above Bayou Sara, on the steamer Sciota, provided the same is received under protection of a gunboat. The taking of any passengers or freight to be landed at any point, or the payment of anything but United States Treasury notes, will work forfeiture of steamer and cargo. The cotton returning on the boat will be reported & identified by M'r O. N. Cutler & the prov. mar. gen'l.

"S. A. HURLBUT, *M. G. C.*"

The claimants then paid Robinson another $5,000, which was disposed of in the same manner as the first.

Afterward, and prior to the 13th day of February, 1865, they paid Robinson the further sum of $3,000, of which he gave $1,000 to General Hurlbut, and the rest was disposed of by Robinson in the provost-marshal-general's office.

Besides the moneys so received by Robinson from the claimants, other moneys were paid him by C. A. Weed & Co., the amount of which does not appear, and also the sum of $1,000 was paid him by one Courtney.

Of the whole amount paid him by all those parties, $8,000 went into the hands of General Hurlbut, who returned the same amount to Robinson on or about the 4th of April, 1865. With the remainder of said whole amount, or a part of it, Robinson purchased gold coin, which he deposited in the First National Bank of New Orleans, taking therefor

certificates of deposit in favor of different officers of the bank, which they endorsed over to him, to the amount of $7,602.25.

VII. In January, 1865, a special commission in New Orleans was appointed by the Secretary of War, with the sanction of the President, and was in session there until May 5 following.

On the 13th of February, 1865, that commission placed the said Robinson in solitary confinement, and the same day stopped the payment of said certificates of deposit; and the amount of them, in gold coin, was afterward turned over by the commission to the Secretary of War, by whom the same was put as a special deposit in the Treasury Department until the 16th of June, 1869, when, at the request of the Secretary of War, the same was covered into the Treasury.

That commission also took $8,000 from said Robinson, which was likewise turned over to the Secretary of War, by whom it was, with the addition of $40 interest, accrued on compound interest notes, paid into the Treasury on the 10th of June, 1869.

VIII. The money paid, as aforesaid, by the claimants to said Robinson was paid by them with the corrupt motive and purpose on their part of procuring official action whereby their cotton should be released.

Additional finding allowed on the request of the claimants.

It does not appear that there were any interviews between the claimants and the said Robinson upon any subject, nor any offer of the payment of any sum or sums of money by them to the said Robinson, for any purpose, until after the seizure, by the United States military police, of the claimant's steamer Sciota and the cargo of cotton thereon,

14 which had been shipped from Bayou Sara, La., under the pass and supervision of Lieut. Com. John J. Cornwell, of the United States steamship Choctaw, on the 13th day of December, 1864.

Upon the foregoing facts the conclusion of law is that the claimants are not entitled to recover, and the grounds of that conclusion are stated in the following

V.—*Opinion.*

DRAKE, Ch. J., delivered the opinion of the court:

This is, in effect, an action for money had and received by the defendants for the use of the claimants, and we are at a loss to see upon what legal ground or principle it could be supposed that they could, under any possible view of the case, be entitled to recover, when the court has found as a fact that the money they paid to Robinson, and which went from him into the War Department, and thence into the Treasury of the United States, was paid by them with the corrupt motive and purpose on their part of procuring official action whereby their cotton should be released.

In argument, it was urged that this was a case of extortion, and not of bribery; but it had no feature of extortion. Robinson demanded no money of them as a consideration for letting their cotton go out of the control of the military authorities back into the possession of the claimants, but the claimants voluntarily offered to pay, and did pay, him money in order to obtain his official aid in procuring the release of the cotton. Under the sixth section of the act of February 26, 1853, "to prevent frauds upon the Treasury of the United States" (10 Stat. L., 170), now incorporated in the Revised Statutes as section 5451, this was bribery, and a high crime and misdemeanor.

Had the claimants sued Robinson to recover back the money they paid him, they could not have recovered it; for in a case where both parties are in pari delicto, the law leaves them where it finds them. If, then, they could not maintain an action against Robinson, they are still less entitled to one against the Government. As between them and Robinson, the money became his the moment they paid it to him; and when it passed from him to the officers of the United States, and from them into the Treasury, it was not the money of the claimants, but, as against them, it was Robinson's. If any one has a claim against the Government for it, it is he.

The petition of the claimants is dismissed.

15 VI.—*Request of claimants for additional findings of fact, filed after the findings by the court and the rulings thereon.*

The claimants request the court to find and file in the above-entitled cause, the following additional facts:

I. It does not appear that there were any interviews between the claimants and the said Robinson upon any subject, nor any offer of the payment of any sum or sums of money by them to the said Robinson for any purpose, until after the seizure by the United States military police of the claimants' steamer Sciota and the cargo of cotton thereon, which had been shipped from Bayou Sara, L'a, under the pass and supervision of Lieut. Commander John J. Cornwell, of the U. S. S. Choctaw, on the 13th day of December, 1864.

II. That of the moneys received by the said Robinson from the
16 claimants, the sum of eight thousand dollars ($8,000), was by the said Robinson converted into gold, and the said gold so purchased by the said Robinson entered into and formed a part of the certificates of deposit of the First National Bank of New Orleans to the amount of $7,602.25, which came into the possession of the commission, and the proceeds thereof in coin turned over by the said commission to the Secretary of War, as stated in the 7th finding of fact.

III. That the money paid by the claimants to the said Robinson, as stated in the 6th finding of fact, was not paid by them to the said Robinson until after the seizure by the military police of the claimants' steamboat and cotton, and was paid by them to the said Robinson in order to secure the release by the military authorities of the claimants' steamer and cotton, which were under seizure at the time of such payment.

JOHN J. WEED,
Attorney for Claimants.

17 Upon the foregoing requests the court makes the following rulings, to wit:

The first of the above requests is allowed; the others are refused.

By the court.

18 VII.—*Final judgment.*

At a Court of Claims held at the Capitol in the city of Washington, on the 18th day of June, A. D. 1877, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said petition of the claimants James S. Clark and Edward Fulton, partners under the firm of James S. Clark and Company, be dismissed.

By the court.

19 VIII.—*Application for and allowance of an appeal.*

The claimants move the court for the allowance of an appeal to the Supreme Court of the United States, in the above-entitled cause, the amount in controversy exceeding the sum of three thousand dollars.

JOHN J. WEED,
Att'y for Claimants.

Filed June 18, 1877.

Ordered, That the appeal be allowed as prayed for.
By the court.
JUNE 18, 1877.

20 In the Court of Claims.

JAMES S. CLARK AND EDWARD FULTON, PARTNERS under the firm of J. S. Clark and Company,
vs.
THE UNITED STATES. } No. 7160.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the request of the claimants for additional findings of fact and the rulings thereon, of the final judgment of the court, of the application of claimants for the allowance of an appeal to the Supreme Court of the United States and the order allowing the same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this sixth day of November, 1877.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 598. James S. Clark and Edward Fulton, partners, as J. S. Clark & Company, appellants, vs. The United States. Court of Claims. Filed 7th November, 1877.

SUPREME COURT U.S.
FILED
NOV 15 1880
JAMES H. MCKENNEY, Clerk

—IN THE—

Supreme Court of the United States.

OCTOBER TERM, A. D. 1880.

JAMES S. CLARK AND EDWARD FULTON, Partners under the Name and Style of J. S. CLARK & Co., Appellants,
vs.
THE UNITED STATES.
} No. 81.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF AND ARGUMENT FOR THE APPELLANTS.

JOHN J. WEED,
Attorney for Appellants.

WASHINGTON, D. C.:
MAX COHEN, PRINTER, 613 7th St.
1880.

—IN THE—

Supreme Court of the United States.

OCTOBER TERM, A. D. 1880.

JAMES S. CLARK AND EDWARD FULTON, Partners under the Name and Style of J. S. CLARK & Co., Appellants,
vs.
THE UNITED STATES.
No. 81.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF AND ARGUMENT FOR THE APPELLANTS.

I.

STATEMENT OF THE CASE.

The appellants on the 26th day of April, 1873, instituted their suit in the Court of Claims, to recover the sum of *ten thousand dollars*, which they allege had been extorted from them by Col. Harai Robinson, in the month of December, 1864; the said Robinson at that time was the United States Provost Marshal General of the Military Department of the Gulf, and assigned to duty in the city of New Orleans, Louisiana. Those parts of the appellants petition that are material to the statement of their case, are as follows:

1st. That on the 26th day of October, 1864, your petitioners

received from the Secretary of the Treasury, with the sanction and approval of the President of the United States, authority and premission to transport from a point on the Mississippi river, near Bayou Sara, in the State of Louisiana, to the city of New Orleans, in the said State, three thousand four hundred and thirty-five bales of cotton, which your petitioners had previous to that time purchased or agreed to purchase; and your petitioners attach hereto a copy of said permit and authority, with the approval of the President thereon endorsed, and also the military and naval orders endorsed thereon, and mark the same exhibit "A," and pray the same may be taken as a part of this petition.

2nd. That some time in the month of December, A. D. 1864, your petitioners, acting under the authority and protection of said permit, as well as under the executive, military and naval orders endorsed thereon, did bring to the said city of New Orleans, on board of the steamer "*Sciota*," three hundred and thirty-six bales of cotton; and your petitioners further state, that immediately upon the arrival of the said cotton at New Orleans aforesaid, the same, with the steamer upon which the same had been transported, was unlawfully seized and detained by one Hiram Robinson, a person in the military service of the United States, acting or assuming to act as provost marshal, under the command and authority of Major General S. A. Hurlburt; and your petitioners further state, the said cotton and steamer were kept under seizure and detained from the possession of your petitioners, for the period of five days, during which time the value of the said cotton depreciated in the market, and your petitioners sustained a loss thereon by reason of said seizure, amounting to fifty-seven thousand dollars.

3rd. Your petitioners further state, that the said provost marshal by whom the said cotton and steamer were seized and detained, demanded from your petitioners, as the condition upon which he would release the said cotton and steamer, the payment by your petitioners to the said provost marshal of the sum of ten thousand dollars; and your petitioners aver, that in order to secure the release and discharge of the said cotton and the said steamer, so as aforesaid unlawfully seized and detained by the said provost marshal, your petitioners paid to the said provost marshal the said sum of *ten thousand dollars*, and that immediately upon such payment the said cot-

ton and the said steamer were released to your petitioners; and your petitioners further aver, that neither the said cotton nor the said steamer were subject to seizure by reason of any acts done or committed by your petitioners, or either of them, in bringing the said cotton to the city of New Orleans, nor was the said cotton and the said steamer liable to seizure and detention for any other reason or cause whatever; and your petifurther aver, that the acts of the said provost marshal in seizing and detaining the said cotton and the said steamer were in all things unauthorized and unlawful.

4th. Your petitioners further represent, that subsequent to the seizure of the said cotton and the said steamer, as well as subsequent to the release of the same by the said provost marshal, a commission was appointed either by the President of the United States or the Secretary of War, to investigate and report in regard to the official acts and conduct of the said provost marshal, which commission was composed of Major General W. F. Smith and the Honorable James T. Brady; and your petitioners further aver, that the said commission in the course of their investigation into the official acts and conduct of the said provost marshal, did seize and take possession of the said sum of ten thousand dollars, so as aforesaid exacted and extorted from your petitioners by the said provost marshal; and your petitioners further aver, that the said commission, subsequent to the time the said sum of ten thousand dollars came into its possession, transmitted the same to the Secretary of War, and your petitioners aver, that the said sum of ten thousand dollars, so as aforesaid extorted from your petitioners by the said provost marshal, and by the said commission transmitted to the Secretary of War, was, by the said Secretary of War, some time in the month of June, A. D. 1869, transmitted to the Secretary of the Treasury of the United States; and the said sum of ten thousand dollars was by the said Secretary of the Treasury paid into the Treasury of the United States.

5th. Your petitioners further state, that while the said sum of ten thousand dollars was retained in the possession of the Secretary of War, your petitioners applied to have the same restored to them, but that the Secretary of War declined to take any action upon such application, and transmitted the said sum of ten thousand dollars to the Secretary of the Treas-

ury, in order that the same might be covered into the Treasury and converted to the use of the United States.

Record pp. 1, 2.

The Treasury permit, and the President's Order, to the appellants for safe conduct, while acting under the authority of the said permit, were as follows:

TREASURY DEPARTMENT, *October* 26, 1864.

J. S. Clark and E. Fulton allege that prior to the second day of July, 1864, under authority of Geo. S Denison, special agent of the Treasury Department at New Orleans, they purchased in the parishes of East and West Feliciana, in the State of Louisiana, 3,435 bales of cotton, upon which they advanced the sum of $123,200 in United States currency, as part payment for the same, and became liable to pay the balance of the purchase money.

That after purchasing and becoming owners of said cotton, and while in the act of moving the same to market for sale, they ascertained that by the passage of the act of July 2, 1864, they were prevented from proceeding with the shipment of said cotton or in any way interfering with the same, and it now remains at the points above named, exposed to the depredations of guerillas. They therefore ask that authority may be granted them to complete the transaction commenced and conducted thus far under the prescribed rules and regulations of the Treasury Department.

After full examination, and in view of the fact that the loyalty of the parties is not questioned, and that there are no adverse claimants to said cotton known to the Department, authority is hereby given to the said J. S. Clark and E. Fulton to transport by way of New Orleans, (where all Government fees and dues shall be paid before shipment therefrom) the cotton in question, provided they shall first present to the acting collector of customs, at New Orleans, the original authorities or permits under which they acted, or copies thereof certified by the officer with whom they are filed, with proof to his satisfaction that the cotton was actually purchased in good faith, under and by virtue of said authorities, and payment made and liabilities incurred as alleged; and provided further, that the said J. S Clark and E. Fulton shall first execute to the satisfaction of the said acting collector at New Orleans, a

bond with sufficient security in the penalty of $250,000, conditioned that all fees and taxes, in any way due or accruing to the Government of the United States from said cotton, shall be paid on its arrival at New Orleans, and any cotton transported or attempted to be transported under this authority without the original permits or authorities, or certified copies thereof and proof herein required, shall be seized and proceeded against for forfeiture and condemnation to the United States.

The acting collector at New Orleans shall record and file, in his office, a copy of this authority, and deliver the original to the said J. S. Clark and E. Fulton, after endorsing upon it his certificate, attested by his official seal, that the required bond has been duly executed and delivered.

The conditions herein stipulated having been complied with, the cotton moving under this authority or under permits given in pursuance hereof, will be allowed to be transported without hindrance or delay.

The leave hereby granted is confined to so much of said cotton as had been actually paid for, or said parties had become legally liable to pay for, under and by virtue of permits properly issued by authority of this Department, prior to said second day of July, 1864, and the power to revoke the authority hereby granted at any time, should satisfactory cause appear, is reserved to this Department.

W. P. FESSENDEN,
Secretary of the Treasury.

EXECUTIVE MANSION, *October* 26, 1864.

The Secretary of the Treasury having, by the terms of and upon the conditions contained in the foregoing paper by him signed, directed that J. S. Clark and E. Fulton be allowed to transport from certain localities in the State of Louisiana, to markets in the loyal States or elsewhere, 3,435 bales of cotton owned by them in said State, and that permits be given them for that purpose by the acting collector of customs at New Orleans.

It is ordered that all cotton moving in compliance with such direction of the Secretary of the Treasury, or permits granted in pursuance thereof, shall be free from seizure or detention by any officer of the Government, and commandants of mili-

tary departments, districts, posts, and detachments, naval stations, gunboats, flotillas, and fleets will observe this order, and give the said J. S. Clark and E. Fulton, their agents and transports, proper facilities and passes for the purpose of getting said cotton through the lines, and safe conduct within our lines while the same is moving in strict compliance with the directions of the Secretary of the Treasury and permits above referred to.

ABRAHAM LINCOLN.

Rec. pp. 3, 4.

THE DEFENSE.

The United States to this petition filed two pleas, as follows:

1st. The General Issue.

2d. The Statute of Limitations of six years, under the 10th section of the act of Congress, approved March 3d, 1863.

Record p. 5.

THE FINDINGS OF FACT.

The I, II, and III findings of fact relate to the issuing of the Treasury permit, the indorsement of the Executive order thereon, the execution by the appellants of the bond required by the said permit, and the shipment of the cargo of cotton by the appellants from Bayou Sara to New Orleans, on the 13th day of December, 1864. The more material findings are as follows:

IV. On the arrival of the steamer Sciota at New Orleans, she and her cargo were seized by the United States military police, under the control of Col. Harai Robinson, then acting as provost-marshal-general of the Department of the Gulf, of which department Gen. S. A. Hurlburt was then in command.

V. After the seizure of the Sciota and her cargo, General Hurlburt issued a special order, stating that by direction of the major-general commanding the Military Division west

of the Mississippi, the cotton brought by the steamer Sciota should be disposed of as follows: A certain number of bales (number not shown) to be given to claimants; the remainder to be turned over to O N. Cutler, the United States purchasing-agent; and that the claimants should give bonds for their appearance when required. On said Robinson's receipt of said order he sent for the claimants, and they appeared before him and gave bonds; at which time they did not exhibit to him any papers in relation to the shipment of cotton. It was not the province of said Robinson to have anything to do with the receiving or disposing of the cotton.

VI. On or about December 21st, 1864, in the evening, after office-hours, the claimants called on the said Robinson at his dwelling, and showed him the papers aforesaid, dated October 26, 1864, signed by the Secretary of the Treasury and the President, which the said Robinson had not before seen or had any knowledge of, and the claimants asked him what he thought of that permit. He told them he thought it was a sweeping one; that it covered all ground. They answered that, notwithstanding that permit, the cotton aboard the Sciota had been seized and detained, and themselves put under bond. He asked how that could be. They answered that the permit was of no account unless signed by the major-general commanding the department. He asked them if they had presented it to the general commanding. They said yes, and it had been refused. He then advised them to go to General Canby, who commanded the Military Division west of the Mississippi, and show the permit to him. They replied, "You know that is useless by the very order which put us under bonds; it states by order of the general commanding the Military Division west of the Mississippi." They further said they were satisfied that it could not be done except by money; that money was wanted; and that they were willing to pay most liberally to have it signed; that that would cover and release the cotton. They said they would pay ten thousand dollars to have that Presidential permit indorsed and their cotton released. He then told them to leave the permit with him and he would see about it.

The next day the said Robinson took the permit to General Hurlbut, and told him the parties wished to have it signed by him. General Hurlbut replied, "Yes, I have seen this permit before. I have refused to sign it." Robinson then said,

"General, these men have offered a large amount of money to get this permit indorsed; there's money in it." Hurlbut perused the permit carefully, and said, "You must take that to Mr. Denison, and have him certify that the proper bonds have been filed by these parties, Clark and Fulton." Robinson took the permit to said Denison, and advised him of the wishes of General Hurlburt. Denison then indorsed on the permit the following certificate:

"CUSTOM-HOUSE, COLLECTOR'S OFFICE,
New Orleans, La., November 16, 1864.

"I certify that J. S. Clark and E. Fulton have delivered to me a bond, duly executed, with proper and sufficient sureties, in the sum of $250,000, as required by the foregoing authority from the Secretary of the Treasury.

[SEAL.] "GEO. S. DENISON,
"*Sp. Ag't of Treasury Dep't & Act'g Collector of Customs.*"

Robinson then took the permit back to Hurlburt, who placed on it the following indorsement:

"HEADQ'RS DEPT. GULF, *Dec. 23d*, 1864.

"The above executive order will be obeyed and respected by all military officers within this department.

"S. A. HURLBURT, *M. Ge.*"

That day, or the next, the claimants handed Robinson, at his dwelling, $5,000, and subsequently, on the same day, he handed that money back to them, stating to them that it did not suit him to receive it in that manner. They asked him how he would receive it. He told them he would receive it through Denison, the collector of the port. The next morning Denison handed him an envelope with $5,000 in it, out of which Robinson took $2,000 or $3,000 and gave it to General Hurlburt, and laid away the balance in the provost-marshal-general's office.

After that money was given to Robinson, the claimant Clark saw him again, and said to him, "Now I have the permit indorsed, see if you can get my cotton released; see if General Hurlburt will give an order releasing or justifying the release of my cotton." Robinson then saw Hurlburt and stated the facts to him, and Hurlburt then wrote the following paper:

"HEADQUARTERS DEPARTMENT OF THE GULF,

New Orleans, Dec. 24, 1864.

"Pursuance to executive order of his Exc'y the President of the United States, J. S. Clark and E. Fulton are permitted to bring the number of bales of cotton in said order mentioned from Ratcliff's Landing, on the Miss. River, 25 miles above Bayou Sara, on the steamer Sciota, provided the same is received under protection of a gunboat. The taking of any passengers or freight to be landed at any point, or the payment of anything but United States Treasury notes, will work forfeiture of steamer and cargo The cotton returning on the boat will be reported and identified by Mr. O. N. Cutler and the provost marshal general.

"S. A. HURLBUT, *M. G. C.*"

The claimants then paid Robinson another $5,000, which was disposed of in the same manner as the first.

Afterward, and prior to the 13th day of February, 1865, they paid Robinson the further sum of $3,000, of which he gave $1,000 to General Hurlbut, and the rest was disposed of by Robinson in the provost-marshal-general's office.

Besides the moneys so received by Robinson from the claimants, other moneys were paid him by C. A. Weed & Co., the amount of which does not appear, and also the sum of $1,000 was paid him by one Courtney.

Of the whole amount paid him by all those parties, $8,000 went into the hands of General Hurlbut, who returned the same amount to Robinson on or about the 4th of April, 1865. With the remainder of said whole amount, or a part of it, Robinson purchased gold coin, which he deposited in the First National Bank of New Orleans, taking therefor certificates of deposit in favor of different officers of the bank, which they indorsed over to him, to the amount of $7,602.25.

VII. In January, 1865, a special commission in New Orleans was appointed by the Secretary of War, with the sanction of the President, and was in session there until May 5 following.

On the 13th of February, 1865, that commission placed the said Robinson in solitary confinement, and the same day stopped the payment of said certificates of deposit; and the amount

of them, in gold coin, was afterward turned over by the commission to the Secretary of War, by whom the same was put as a special deposit in the Treasury Department until the 16th of June, 1869, when, at the request of the Secretary of War, the same was covered into the Treasury.

That commission also took $8,000 from said Robinson, which was likewise turned over to the Secretary of War, by whom it was, with the addition of $40 interest, accrued on compound-interest notes, paid into the Treasury on the 10th of June, 1869.

VIII. *The money paid, as aforesaid, by the claimants to said Robinson was paid by them with the corrupt motive and purpose on their part of procuring official action whereby their cotton should be released.*

Additional finding allowed on the request of the claimants.

It does not appear that there were any interviews between the claimants and the said Robinson upon any subject, nor any offer of the payment of any sum or sums of money by them to the said Robinson, for any purpose, until after the seizure, by the United States military police, of the claimant's steamer Sciota and the cargo of cotton thereon, which had been shipped from Bayou Sara, La., under the pass and supervision of Lieut. Com. John J. Cornwell, of the United States steamship Choctaw, on the 13th day of December, 1864.

Record pp. 5, 6, 7, 8.

At the time the appellants requested the above additional finding, their attorney presented the following request to the Court of Claims, viz:

IN THE COURT OF CLAIMS.

DECEMBER TERM, 1876.

JAMES S. CLARK ET AL, *vs.* THE UNITED STATES. } No. 7,160.

The claimants request the Court to *amend* the findings of fact filed in the above-entitled cause, by striking out in the 6th finding, on page 6, the following language:

"Afterwards, and prior to the 13th day of February, 1865,

they paid Robinson the further sum of $3,000, of which he gave $1,000 to Gen'l. Hurlbut, and the rest was disposed of by Robinson in the provost marshal general's office."

And also the following language in said 6th finding, pp. 6 and 7:

"Besides the moneys so received by Robinson from the claimants, other moneys were paid him by C. A. Weed & Co., the amount of which does not appear; and also the sum of $1,000 was paid him by one Courtney."

The claimants request the above amendments to the findings filed herein for the following reasons:

1st. Because the sum of $3,000, alleged to have been paid by the claimants to Robinson between December 23d, 1864, and February 13th, 1865, is no part of the claim embraced in the claimants' petition, and does not in any manner relate to any of the acts of the said Robinson, out of which the claimants' cause of action arose.

2d. Because the fact that other parties besides the claimants paid to the said Robinson certain sums of money for some purpose which does not appear, is irrelevant and impertinent to the issues involved in the claimants action.

JOHN J. WEED,
Attorney for Claimants.

But the Court of Claims refused to receive the said request, or to permit it to be filed as a motion in said cause, and refused to allow it to be made a part of the record in said cause. It is only brought to the attention of this Court in a seemingly inappropriate manner, in order that the Court may be advised that the attorneys for the appellants, in the Court of Claims were not unmindful of, and did not seek to correct the extraordinary and impertinent language used by the Court of Claims in its *sixth* finding, to which the foregoing request was directed.

II.

THE JUDGMENT AND THE APPEAL THEREFROM.

The Court of Claims, on the 18th day of June, 1877, ren-

dered its judgment adverse to the appellants, and ordered their petition to be dismissed; and the appellants on the date of the rendition of the said judgment prayed an appeal to this Court, which was allowed.

Record pp. 9, 10.

III.

Assignment of Errors.

1st. The Court of Claims erred in deciding that the appellants' cotton was not protected from seizure by the military authorities, by the terms of the Treasury permit and the Executive order indorsed thereon, dated October 26, 1864.

2nd. The Court of Claims erred in deciding that the money paid by the appellants to the officers of the United States, as stated in the *sixth* finding, to secure the release of their property from an illegal seizure thereof by such officers, was a payment of the said money by the appellants to the said officers for a corrupt, immoral, and an illegal purpose.

3rd. The Court of Claims erred in rendering a judgment adverse to the appellants, and in dismissing their petition.

IV.

Points and Authorities.

A. The Treasury permit, and the Executive order issued thereon, dated October 26, 1864, was such a license to the appellants by the Executive authorities of the Government, as protected their cotton from seizure by the military police; and the seizure of the said cotton by the provost marshal general in violation thereof, was an unlawful act.

The determination of this proposition involves the consideration of the *power* of the President to license commercial

intercourse between the loyal and disloyal States, subsequent to the passage of the act of Congress, approved July 2, 1864.

It is appropriate, in discussing this question, to refer to some of those familiar principles which are so firmly established as to be regarded as *axioms*, rather than propositions about which there can be either disagreement or discussion:

1. It is a universal principle that all subjects or citizens of belligerent powers are enemies.

Halleck International Law, Chap. XV, Sect. 8, P. 357.

2. Absolute interruption and interdiction of all commercial intercourse and dealings between the citizens or subjects of the two belligerents is an immediate and necessary result of the existence of a state of war between belligerents.

Same Chap., Sect. 9, P. 357.

3. Martial Law, is always a necessary incident of a state of war.

Same Chap., Sect. 25, p. 373.

4. Martial Law may only be declared and administered by the Sovereign or Executive.

Same Chap., Sect. 2, 6 *et seq.*

5. The power to suspend the writ of *Habeas Corpus* is only an incident of Martial Law.

Same Chap., Sect. 27, p.

6. That power, like all powers for the conduct of a war, is vested in the President, and not in Congress.

See pp. 378 and 379, Sect. 30, p. 380.

From these propositions it necessarily results, that in a state of war, the President in his capacity as Commander-in-Chief, exercises the war power of the Government *virtute officio*, and that martial law becomes a part of the Constitution.

7. From the principle first stated comes the rule, "that property of a subject found engaged in trade or intercourse

with the ports, territories or subjects of a public enemy, is liable to confiscation."

Halleck, Chap. XXI, Sect. 1, p. 496.

8. To this rule there are but two exceptions:

First. "The mere exercise of the rights of humanity."

Second. "Trade sanctioned by the license or authority of the Government."

Same chap., sec. 2, p. 498.

9. *Licenses* to trade are either general or special, and must be respected by all officers and tribunals of the State which issues them.

Chap. 27, secs. 1 and 2, p. 675.

10. *General licenses*, as a *rule*, in the United States, are granted under authority of an act of Congress.

Same sections.

11. But "in special cases, and for the purposes connected with the prosecution of a war, by the President as Commander-in-chief."

P. 677.

12. A *special* license must, as a general rule, also emanate from the supreme authority of the State.

Note the exceptions, p. 677, sec. 3.

See sections following.

The conclusion to be deduced from these general propositions is, that under the Constitution, and by virtue of his office, the President, in the absence of Congressional legislation, has *unqualified and unlimited discretion*, in regard to granting licenses to trade; and if this proposition is admitted, then it is believed that no action of Congress could take away this discretion from him.

Halleck, p. 379.

Luther vs. Borden, 7 Howard, 42, 43, 44, 45.
Story on the Const., Sect. 1,342.
Martin vs. Mott, 12 Wheaton, 19.
Halleck, p. 380, Sects. 28, 30.

The *war power* of the Executive on the subject of intercourse between the United States and those with whom it was at war during the late rebellion, may be stated as follows:

1. By the law of Nations, and the laws of war, all intercourse between subjects of belligerents is unlawful; but the Commander-in-Chief can make exceptions at his pleasure, and in his discretion.

2. The act of Congress, approved July 13, 1861, was only a legislative recognition of the principles of non-intercourse declared, and recognized by the law of Nations and the laws of war, and in the *proviso* in the *Fifth* section is also a recognition and *limitation* of the powers of the Commander-in-Chief.

The act of July 2, 1864, in its 8th section, provides for the *purchase* by agents of the United States of any property, "product of States declared in insurrection at three-fourths the market value in New York;" and Section 9 repeals the *proviso* in the *Fifth* section of the act of July 13th, 1861.

The effect of the repealing clause in Sec. 9 is no more than to repeal the *limitation* on the executive authority in Sec. 5, act July 2, 1861.

That section recognized the right of the President to allow intercourse at his discretion, but only in pursuance of rules and regulations prescribed by the Secretary of the Treasury.

The original power of the President, as Commander-in-Chief, is by the Constitution and the Laws of Nations and of War, beyond the control of Congress, while war exists.

The gift of power by Congress, in the act of 1861, was supererogation, for he had it already, by virtue of his office as Commander-in-Chief.

with the ports, territories or subjects of a public enemy, is liable to confiscation."

Halleck, Chap. XXI, Sect. 1, p. 496.

8. To this rule there are but two exceptions:

First. "The mere exercise of the rights of humanity."

Second. "Trade sanctioned by the license or authority of the Government."

Same chap., sec. 2, p. 498.

9. *Licenses* to trade are either general or special, and must be respected by all officers and tribunals of the State which issues them.

Chap. 27, secs. 1 and 2, p. 675.

10. *General licenses*, as a *rule*, in the United States, are granted under authority of an act of Congress.

Same sections.

11. But "in special cases, and for the purposes connected with the prosecution of a war, by the President as Commander-in-chief."

P. 677.

12. A *special* license must, as a general rule, also emanate from the supreme authority of the State.

Note the exceptions, p. 677, sec. 3.

See sections following.

The conclusion to be deduced from these general propositions is, that under the Constitution, and by virtue of his office, the President, in the absence of Congressional legislation, has *unqualified and unlimited discretion*, in regard to granting licenses to trade; and if this proposition is admitted, then it is believed that no action of Congress could take away this discretion from him.

Halleck, p. 379.

Luther vs. Borden, 7 Howard, 42, 43, 44, 45.
Story on the Const., Sect. 1,342.
Martin vs. Mott, 12 Wheaton, 19.
Halleck, p. 380, Sects. 28, 30.

The *war power* of the Executive on the subject of intercourse between the United States and those with whom it was at war during the late rebellion, may be stated as follows:

1. By the law of Nations, and the laws of war, all intercourse between subjects of belligerents is unlawful; but the Commander-in-Chief can make exceptions at his pleasure, and in his discretion.

2. The act of Congress, approved July 13, 1861, was only a legislative recognition of the principles of non-intercourse declared, and recognized by the law of Nations and the laws of war, and in the *proviso* in the *Fifth* section is also a recognition and *limitation* of the powers of the Commander-in-Chief.

The act of July 2, 1864, in its 8th section, provides for the *purchase* by agents of the United States of any property, "product of States declared in insurrection at three-fourths the market value in New York;" and Section 9 repeals the *proviso* in the *Fifth* section of the act of July 13th, 1861.

The effect of the repealing clause in Sec. 9 is no more than to repeal the *limitation* on the executive authority in Sec. 5, act July 2, 1861.

That section recognized the right of the President to allow intercourse at his discretion, but only in pursuance of rules and regulations prescribed by the Secretary of the Treasury.

The original power of the President, as Commander-in-Chief, is by the Constitution and the Laws of Nations and of War, beyond the control of Congress, while war exists.

The gift of power by Congress, in the act of 1861, was supererogation, for he had it already, by virtue of his office as Commander-in-Chief.

The limitation upon his discretion in that act was advisory rather than mandatory—for discretion cannot be limited.

It was a wise and prudent suggestion, and was so accepted and acted upon—but it was nothing more.

The one thing which Congress could repeal was the limitation; and that only was the effect of Sec. 9 of the act of July 2, 1864.

That act did not, nor could it take from the President his Constitutional power, as Commander-in-Chief of the Army, to grant a license, or give safe conduct to any person for any purpose, that to him might seem appropriate. The license and safe conduct under which the appellants were proceeding, and by which their property ought to have been protected at the time of its illegal seizure, was a license and safe conduct issued by the President in the exercise of a power that was superior to, and independent of, any act of Congress. Both President Lincoln, and Secretary Fessenden, were profound Constitutional lawyers, and it is not to be supposed that in granting the license and safe conduct to the appellants, as shown in the record, they deliberately violated and treated with contempt a law of Congress. The license and safe conduct refer to the act of July 2, 1864, so it cannot therefore be assumed that those distinguished officials were unmindful of its provisions. It is far more consistent to assume that the license to the appellants was issued under a power that did not depend for its existence upon the whim or caprice of Congress; and being issued in virtue of that independent and superior power, derived from the Law of Nations, and the Constitution, it was mandatory upon all subordinate military officers, and entitled the appellants to complete protection from the illegal detentions and arrests of such subordinate officers.

B. The extortion of money from the appellants by the provost marshal general at New Orleans, *to secure the release of the appellants' cotton*, and the indorsement of

the said permit and Executive order, was an unlawful act, and the money paid by the appellants for that purpose might have been recovered by the appellants in an action brought by them for that purpose against the provost marshal general.

C. The wrongful and fraudulent acts of the provost marshal general, by which the money belonging to the appellants came to the possession of the United States, did not divest the appellants of their property in the said money, nor of their right to follow it in the possession of the United States, and recover it in an action brought by them for that purpose *against* the United States.

An action for money had and received may be maintained whenever the defendant has received the *money*, which is the property of the plaintiff, and which the defendant is obliged by the ties of natural justice and equity to refund.

Carey *vs.* Curtis, 3 Howard, S. C. R., 249.

In the same case, Mr. Justice Story, in a dissenting opinion upon other points, used the following language:

It is an entire mistake to say that the action of the assumpsit for money had and received is founded upon a voluntary, express, or implied promise of the defendant, or that it requires priority between the parties *ex contractu* to support it. The rule of the common law has a much broader and deeper foundation, whenever the law pronounces that a party is under a legal liability or duty to pay over money belonging to another, which he has no lawful right *to exact or retain from him*, then it forces the promise upon him, *in invitum* to pay over the money to the party entitled to it. It is the result of the potency of the law, and is in no shape dependent upon the will or consent of the voluntary promise of the wrongful possessor.

In Nash *vs.* Towne, 5 Wallace, 702, the following language is used:

Assumpsit for money had and received is an equitable action to recover back money which the defendant in justice *ought not to retain*, and it may be said that it lies in most, if not all cases, where the defendant has moneys of the plaintiff, which *ex æquo et bono*, he ought to refund.

Moses *vs.* Macfarlan, 2 Burrows, 1008, 1012.
Clark *vs.* Shee, Cowper, 197, 199, 200.
Butler *vs.* Harrison, Cowper, 565.
Chillon *vs.* Broidon, 2 Block, 460.
Castle *vs.* Bullard, 23 Howard, S. C. R., 189.
Olmstead *vs.* Hotaling, 1 Hill R., 318.

This court, in the case of the State National Bank of Boston *vs.* The United States, 10 Court of Claims R., p. 519, has recognized these principles in the following language:

The true character of this action is that of a common-law action of *assumpsit* for money had and received. The principles and rules applicable to that form of action belong to the elementary knowledge of the bar and the courts. In its spirits and objects it has been likened to a bill in equity, and it lies whenever the defendant has received or obtained possession of the money of the plaintiff, which in equity and good conscience he ought to pay over to the plaintiff. And in order to support this action there need be no privity of contract between the parties, except that which results from one man's having another's *money* which he has not a right conscientiously to retain.

10 Court of Claims R., 545.

D. The appellants paid the money to the provost marshal general to procure the release of the property illegally seized by that officer *previous to the time of such payment, and for the purpose of obtaining the possession of property so unlawfully detained from them.* It is well settled that money paid for such a purpose may be recovered back by the party paying it in an action for the money had and received.

Atlee *vs.* Backhouse, 6 M. & W., 633, 650.
Chase *vs.* Dwinall, 7 Greenl. R., 134.
Oates *vs.* Hudson, 6 Exch., 346.
Shaw *vs.* Woodcock, 7 B. & C., 73.
Joyner *vs.* Egremont, 3 Cush., 567.
Preston *vs.* Boston. 12 Pick., 7, 14.
Boston & Sandwich Glass Co. *vs.* Boston, 4 Mich., 181, 188.
Riply *vs.* Gelston, 9 Johns, 201.
Clinton *vs.* Strong, 9 Ibd., 370.
Baltimore *vs.* Heffernan, 4 Gill, 425.
Forbes *vs.* Appleton, 5 Cush., 118.
Storer *vs.* Mitchell, 45 Ill., 213.
Parsons on Contracts, vol. I, p. 395, (5th ed.)

The claimants were without any legal remedy by which they could recover the possession of the cotton unlawfully seized by order of the provost marshal general. There were no civil tribunals in existence in New Orleans at that time, whose jurisdiction might be invoked to protect the claimants in their rights. The military authority there exercised was exclusive and supreme, and the claimants had *no alternative*, except to submit to the illegal extortions of the provost marshal general. They could obtain possession of their cotton in no other way.

E. The right of the appellants to recover in this action cannot be defeated upon the maxim: *In pari delicto portior est conditio defendentis.*

The evidence does not establish such a state of facts as renders this principle applicable. The appellants' cotton had been seized previous to the payment of the money, and the Executive order of the President of the United States, by which their cotton was protected from seizure by the military authorities, was ignored and treated with contempt. The

acts of the provost marshal general were illegal and oppressive, and the appellants were obliged to pay the money *extorted* by that officer or submit to those acts. It was not a case of *par delictum*. It was oppression on one side and submission on the other. It can never be predicated as *par delictum*, when one holds the rod and the other bows to it.

Broom's Legal Maxims, 486 (5th Am. ed.)
Smith *vs.* Cuff, 6 M. & S., 160.
Alsoqer *vs.* Spalding, 4 Bing. N. C., 407.
Horton *vs.* Riley, 11 M. & W., 492.
Browning *vs.* Morris, Couper, 790.

It was the despotic military rod of the provost marshal general, to which the claimants bowed submission. It was the persuasive argument which resulted from the illegal seizure of the appellants' cotton, which caused them to seek the office of the provost marshal general for that relief which they could not obtain elsewhere. It would be a strange perversion of the criminal code if the appellants could have been convicted of *bribery*, for the payment of money to the provost marshal general, under the circumstances which this record discloses; and yet *that* is the conclusion which this court must reach before it can declare that the appellants were *particeps criminis* in the illegal acts of that officer.

F. The case of the appellants is not barred by the statute of limitations, because their cause of action only accrued against the United States at the time the money which the provost marshal general had extorted from the appellants, was covered into the Treasury of the United States, and the suit of the appellants in the Court of Claims was instituted within six years from that date.

The defense based upon the statute of limitations, was that for which most strenuous contention was made in the Court

of Claims. It was unnecessary for that Court to pass upon that question, since the decision was based upon other grounds.

Assuming that the same defense will again be urged here, the attention of the Court is invited to some suggestions upon that question.

That defense is based upon the 10th Section of the act of Congress relating to the re-organization of this Court, approved March 3, 1863, which provides as follows:

That every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition, setting forth a statement of the claim, be filed in the Court or transmitted to it under the provisions of this act within six years after the claim first accrues.

12 Stat. at Large, p. 767.

The claim asserted in the appellants' petition only became *a claim against the United States* from the time the money extorted from the claimants was delivered by the Secretary of War to the Secretary of the Treasury, and, by the last-named officer, covered into the National Treasury. Previous to that time it was subject to the absolute disposal of the Secretary of War, and that officer might have restored it to the claimants or to the provost marshal general; and if he had done either, there was no authority which could have reviewed or called in question his action upon that subject. The money once having been covered into the Treasury, could be obtained by the claimants only by an act of Congress or the judgment of this court. There would be no "*claim*" to this money which these appellants could assert *against the United States*, until the United States asserted some claim to it, *adverse to the appellants' rights*. There was no assertion of this adverse right by the United States so long as the money remained in the custody of the Secretary of War. There was no pretense *then* that the money belonged to the United States, or that the United States had acquired any right to retain it

by any legal proceedings instituted for that purpose, either against the appellants, or against the provost marshal general, or against the money which that officer had extorted from the appellants.

There was no claim asserted to this money previous to that time except by the appellants, and the provost marshal general; and it clearly belonged to one of them. If it had been illegally extorted from the appellants, it belonged to them. Even if it had been received by the provost marshal general as a *bribe*, it belonged to him unless it was taken from him by the judgment of some tribunal having jurisdiction of his offence. The appellants' right to maintain this action does not depend upon the ratification by the United States of the illegal acts of those officers through whose instrumentality their money came into the possession of the United States. This action is to recover back money which the United States ought not, in equity and good conscience, to retain. The time when the statute of limitations began to run against the appellants' rights was when the United States asserted its purpose to retain the appellants' money; then, and not before, the appellants' right of action accrued and became cognizable in this court.

The true test for the solution of this proposition is to be found in the determination of the question, whether *previous to the time the money extorted from the appellants was covered into the Treasury*, there could have been any action maintained therefor by the appellants against the United States. It is obvious that while the money was retained in the custody of the Secretary of War, he could have defeated such an action by refunding it to the appellants, or by paying it back to the provost marshal general. No action could have been maintained against that officer, if he had done, or had refused to do, either of those acts. The only right of action which the appellants ever acquired against the United States in respect to this money, resulted from the

appropriation of the money to the use of the United States by making it a part of the public money in the National Treasury. The appellants filed their petition in the Court of Claims within six years from the time when that act of *appropriation* was declared by the United States. When that purpose was declared, and the money converted to the use of the United States, the appellants' only remedy *against the United States* was by application to Congress, or to institute their suit in the Court of Claims.

V.

The Opinion of the Court of Claims.

The opinion of the Court of Claims declares that this case has none of the elements or incidents necessary to establish the fact that the money which the appellants seek to recover in this suit, was obtained from them as the result of *extortion*, practiced by the officer to whom it was paid; but that the acts of the appellants in paying the money to the provost marshal general, under the circumstances detailed by the Court in its *sixth* finding constituted the crime of *bribery*, under the act of Congress, approved February 26, 1853.

10 Stat. at Large, 170.

The argument of the Court of Claims in support of this proposition is as follows:

In argument, it was urged that this was a case of extortion, and not of bribery; but it had no feature of extortion. Robinson demanded no money of them as a consideration for letting their cotton go out of the control of the military authorities back into the possession of the claimants, but the claimants voluntarily offered to pay, and did pay him, money in order to obtain his official aid in procuring the release of the cotton. Under the sixth section of the act of February 26, 1853, "to prevent frauds upon the Treasury of the United States" (10 Stat. L., 170), now incorporated in the Revised

Statutes as section 5451, this was bribery, and high crime and misdemeanor.

Record p. 8.

In coming to this conclusion, the Court of Claims seems to have entirely overlooked these essential and vital provisions of that statute which constitute the offense of bribery under its provisions. The statute expressly declares with what *intent* the payment of money to a public officer shall constitute the crime of *bribery*, in the following language:

"With intent to influence his decision or action on any question, matter, cause or proceedings, which may *by law* be brought before him in his official capacity, or in his place of trust or profit, or with *intent* to influence him to commit or aid in committing, or to collude in, or allow any fraud, or make opportunity for the commission of any fraud on the United States, or to induce him to do, or to omit to do, any act *in violation of his lawful duty*."

U. S. Revised Statutes, (1878,) Sect. 5,451.

Was there any *intent* to influence the decision or action of the provost marshal general in regard to any question, matter, cause or proceeding, *which was by law* brought before him in his official capacity, or in his place of trust or profit, when the appellants presented to that officer their Presidential order for safe conduct, and demanded the release of their cotton previously illegally seized by the same provost marshal general?

Was there any *intent* on the part of the appellants, when they paid their money to secure the release of their cotton *illegally seized* by the provost marshal general, "*to influence him to commit, or aid in committing, or to collude in, or allow any fraud, or make opportunity for the commission of any fraud on the United States, or to induce him* (the provost marshal general) *to do, or to omit to do, any act in violation of his lawful duty?*"

Each of these inquiries must be answered in the negative. The appellants' cotton was not liable to seizure for any cause; and its return to them resulted in depriving the United States

of no right which they had required by virtue of that seizure. The facts found by the Court of Claims show that there were no interviews between the provost marshal general and the appellants, until their Presidential order for safe conduct had been violated and treated with contempt by the seizure of the cotton which they had brought to New Orleans, under the guarantee of protection contained in their license and order of safe conduct. Is it *bribery* of a public officer to pay him money to restore to the citizen property he has illegally seized and detained, when there is no other and legal mode to recover its possession? At the time of this transaction, the military and not the civil law was in force, and furnished the only remedy in the city of New Orleans. The appellants could procure no writ of *replevin*, and by that means cause the return to them of the steamer and cotton unlawfully detained by the military authority. The appellants were satisfied that it was with the purpose to obtain money that their cotton and steamer were seized, because their license and order for safe conduct had been exhibited to the Commanding General of the Department before the seizure. The facts stated in the *sixth* finding justify this conclusion, for it is there stated that the Commanding General of the Department, when the appellants' license and order for safe conduct were presented to him, *subsequent to the seizure of the cotton*, replied, "*Yes, I have seen this before; I have refused to sign it.*" Why should that officer have refused to recognize and obey an order of the President—the Commander-in-Chief of all the Armies—but for the purpose of oppressing the citizen by seizing his property, and then extorting money as a condition of the restoration of the property seized? The facts clearly show that the provost marshal general was used for the purpose of accomplishing that object, and securing that end. It might with equal propriety be urged that the seizure and detention of the property of the citizen, until the payment of an illegal and unauthorized tax had been enforced by the tax collector, is *bribery*, as to as-

sume upon *all* the facts the Court of Claims has found, that the appellants ought to have been punished for bribery, and the military officers acquitted of the offense of extortion, in the transactions which the record in this case reveals with such remarkable clearness and irresistible force.

The attention of this Court is also invited to the following language in the opinion of the Court of Claims, because it states conclusions so remarkable in respect to the ordinary obligations of honesty and morality:

> Had the claimants sued Robinson to recover back the money they paid him, they could not have recovered it; for in a case where both parties are in *pari delicto*, the law leaves them where it finds them. If, then, they could not maintain an action against Robinson, they are still less entitled to one against the Government. As between them and Robinson, the money became his the moment they paid it to him; and when it passed from him to the officers of the United States, and from them into the Treasury, it was not the money of the claimants, but, as against them, it was Robinson's. If any one has a claim against the Government for it, it is he.

The correctness of the legal proposition stated in the first sentence of the above quotation, is not either doubted or disputed, if upon the facts so clearly established by the findings of the Court of Claims, a case of *par delictum* is made out; but the appellants' contention is, that the facts here shown do not justify the application of that principle. The logic, as well as the morality of the concluding part of the above quotation, is, that a public officer of the United States, who has, by the use of military authority unjustly and oppressively exercised, obtained money from the citizen, may recover it from the United States, after it has compelled the officer who has obtained it from the citizen, to pay it over to the United States. It is not to be assumed that the United States, when it compelled the restitution of the money that the provost marshal general had illegally obtained from the appellants,

was recovering it for the benefit of that officer, and yet that is the unanswerable logic of the proposition contained in the above quotation from the opinion of the Court of Claims. The inevitable result of conceding that proposition is to offer a premium on oppression and extortion practiced upon the citizen by a public officer. It cannot be admitted or believed that a proposition so entirely at war with both good morals and good law will ever find sanction here.

The appellants, in conclusion, submit that the following propositions must be conceded as established by the authorities to which the attention of the Court has been directed:

1st. That under the Law of Nations, and the Constitution, the President of the United States, as Commander-in-Chief of the Armies in time of war, may grant special licenses to trade with the enemy, *in his discretion*, and accompany such license with a Presidential order for protection and safe conduct to the person to whom such license was issued

2nd. That the authority of the President to grant the license and order for safe conduct issued to the appellants on the 26th day of October, 1864, was not in any respect taken away by the repeal of the *proviso* contained in the *fifth* section of the act of July 13th, 1861.

3rd. That the seizure of the steamer and cotton belonging to the appellants, which came to New Orleans, on the 13th day of December, 1864, under the authority and protection of the license and order for safe conduct issued to the appellants on the 26th day of October, 1864, was illegal, because it was in contempt and violation of a license and order for safe conduct issued and granted by the President of the United States.

4th. That the payment by the appellants of the sum of *ten thousand dollars*, to the provost marshal general, to secure the release of their steamer and cotton from an illegal seizure, did not, upon the facts found by the Court of Claims, consti-

tute the crime of *bribery*, under sections 5451, of the Revised Statutes, but was a payment by the appellants under duress of property illegally seized and detained.

5th. That the appellants' right to recover in this action, is not defeated by the maxim: *In pari delicto portior est conditio defendentis.*

6th. That the United States, having compelled the officer by whom the money was obtained from the appellants, to pay the same to the United States, and it having been appropriated to its use by being covered into the National Treasury, the appellants may maintain against the United States their action in the Court of Claims for the amount recovered from the officer by the United States, as being money had and received for the use of the appellants.

7th. That the appellants' right to maintain this action is not barred by the Statute of Limitations, because their right of action *against the United States*, only accrued at the date when the money recovered by the United States from the provost marshal general, had been *appropriated* to their use by being covered into the Treasury, *and the appellants' suit was instituted in the Court of Claims, within six years from that date.*

If these propositions are established, and admitted, it must necessarily result that the decision of the Court of Claims should be reversed, and the cause remanded, with directions to that Court, to enter a judgment in favor of the appellants for the amount claimed in their petition.

JOHN J. WEED,

Attorney for Appellants.

OFFICE SUPREME COURT U. S.
FILED
NOV 29 1880
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1880.

No. 86.

CLARK, &c., *vs.* THE UNITED STATES.

BRIEF FOR THE UNITED STATES.

It is submitted that the record of facts justifies the finding VIII, that the money paid by the claimants to Robinson, and now sought to be recovered, *was paid by them with the corrupt motive and purpose on their part of procuring official action whereby their cotton should be released.*

There is some appearance of forgetfulness in the statements of the petition when compared with the evidence on behalf of the claimant. In the petition (folio 2) it is stated that "some time in the month of *December, 1864*," the claimants acted under the authority and protection of "Exhibit A," *i. e. a permit* signed by the Secretary of the Treasury, approved by the President, and showing certain executive, military, and naval orders endorsed thereon. By the exhibit itself, it appears that these *naval* orders were not given until the 1st and 4th days of *January, 1865*. This circumstance renders the allegation above referred to ambiguous, and perhaps would have the effect of correcting the date of the action by the claimants, to some point of time after January 4th, 1865. At all events if the naval orders be disregarded it is plain that the indefinite expression "sometime in *December*" would be fixed by the date

[December 23d] of the *military* order, endorsed upon the permit *at that date or at some other subsequent thereto.*

This is material to the theory of the petition, which is, that at the time when the cotton was seized the claimant had obtained all necessary recognitions of the permit by the various officers in local command, so that a subsequent detention of that cotton by one of these, was in *bad faith*, and gave the color of *extortion*, instead of *bribery*, to the payment of the money, a recovery of which is the object of the present suit; which money it is conceded was paid for a release of such cotton.

But the record shows (Finding III, p. 5) that transportation of the cotton had begun December 13th, 1864, and that on or before December 21st, the seizure in question had been made at New Orleans, (Findings IV and VI, p. 6,) *i. e. before* the date of the endorsement of the order given by the military officer in local command. That is, it appears that such order was given in consequence of something that transpired after the seizure. If such order were *official*, then under the circumstances attending the payment disclosed in finding VI, there can be little doubt that such payment was *bribery*, as distinguished from *extortion*. There is, consequently, so far some evidence of an absence of that *innocence* on the part of the payer which is required to make a case of *extortion*, or at least of that sort of extortion which justifies a recovery of the money paid, under the principles of *algum et bonum* sought to be enforced here.

This is not all; for it appears by finding VI (page 6, bottom,) that the certificate given by Collector Dennison—also referred to in the petition and dated *November* 16, 1864—was not endorsed upon the permit until on or after *December* 22, 1864.

This circumstance appears to nullify every pretension by the claimant to innocence.

For the permit given by the Secretary of the Treasury and the

President expressly required such endorsement by the Collector to be made before the cotton should be transported or attempted to be transported thereunder, under penalty of its seizure and forfeiture. (Exhibit A to petition, page 3, bottom, and page 4, top.)

Therefore, at any time on or before the 21st of December it was proper for the commanding general to have such cotton seized that it might be proceeded against for forfeiture. It was, of course, also proper for him *at any time theretofore* to refuse to *sign* such permit, as the claimants *complained* that he had done. (Finding VI.)

The case, therefore, in general, is one in which claimants who had undertaken, in the very face of their permit, to act illegally, (and, it may be believed, with fraudulent purpose,) and who were apprehended therein, show themselves ready to seek relief from one position—*of probable mala fides* —by resorting to another *notoriously so.* Surely *innocence* upon their part is out of the question.

The learned court below has, as it seems, with great propriety treated the question of law involved in the *findings* as a plain one, wanting but few words.

Referring to Clark's case, 96 U. S., 37, and Pugh's case, 99 U. S., 265, I have limited myself to the making of such references to the findings and pleadings as justified the Court of Claims in attributing a *corrupt motive* (finding VIII) to the claimants in the payment now sought to be reformed and undone. I submit accordingly that such preliminary findings not only *justified* but compelled such conclusion.

S. F. PHILLIPS,
Solicitor General.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~805~~ ~~1165~~ ~~227~~ 28

W. S. HUNNICUT, G. W. BARNES, ET AL., PLAINTIFFS IN ERROR,

vs.

BALIE PEYTON, SALLIE B. PARKER, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED OCTOBER 5, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 809.

W. S. HUNNICUT, G. W. BARNES, ET AL., PLAINTIFFS IN ERROR,

vs.

BALIE PEYTON, SALLIE B. PARKER, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

INDEX.

	Original.	Print.
Title of cause in Supreme Court United States	½	1
Petition	1	1
Answer of Zenas Bartlett and wife and A. E. Watson and children	5	3
T. R. Webb	7	4
W. Killebrew	8	4
Barnes, Kelly, Cockrill, and Frazier	9	5
David Cockrill and David Frazier	10	5
C. R. Johns, Everett, Von Rosenberg, and W. S. Hunnicut	10	6
Amended petition	11	6
Answer of W. H. Jones	12	6
Further answer of W. H. Jones	14	7
Further answer and pleas of A. E. Watson and children	19	10
Further answer and pleas of Zenas Bartlett and wife	25	13
Answer of W. R. Reagan	30	15
Appearance and order allowing Thomas H. Barry, the husband and the children of Jane H. Barry, deceased, to make themselves parties plaintiff	31	15
Amended pleas of plaintiff	33	16
Verdict and judgment	38	18
Motion for new trial	44	20
Order overruling motion for new trial	48	22
Extension of time to defendants for filing bills of exception	49	22
Charge of the court	51	23
Defendan'ts' first bill of exceptions	73	31
1. Power of attorney and substitution from Gregorio Basquez to J. Hartz	73	31
2. Act of sale, Basquez to Hartz	75	32
3. Substitution of Jonathan C. Peyton by Jayne Hartz to be attorney of Gregorio Basquez	81	34

	Original.	Print.
4. Act of sale of the concession of Basquez to Jayne Hartz to Jonathan C. Peyton	82	35
5. Grant of title, Luke Lesassier, alcalde, &c., of eleven leagues of land, including the four leagues in controversy, to Jonathan C. Peyton, attorney, &c	85	36
Defendants' second bill of exceptions	89	38
Deposition of Horatio Chrisman	89	38
Defendants' third bill of exceptions	97	41
Defendants' fourth bill of exceptions	99	42
Report of surveyors, case Huckins and Poole	100	43
Report of W. S. Hunnicut	102	44
Defendants' fifth bill of exceptions	104	45
Translation of title for eleven leagues of land to Gregorio Basquez	104	45
John Marlin, title to head-right league	117	50
José M. Sanchez, title to five leagues	122	52
Copy of the original field-notes of the Sanchez grant by Deputy Surveyor Moore	137	59
Defendants' sixth bill of exceptions	140	61
Defendants' seventh bill of exceptions	142	61
Sketch from map Falls County, December 28, 1874	143	61
Deposition of Emmeline D. Taylor	144	62
W. R. Reagan	150	65
George T. Robinson	167	72
T. G. Poole	173	75
B. Killebrew	175	76
W. S. Poole	177	77
J. D. Oltorf	181	78
Testimony of General Thomas Harrison	182	79
F. W. Johnson	186	81
(In connection) compilation of meanders of the Brazos made by him	189	82
photographic copies X and Y	193	84
certified copies of Basquez four leagues	198	86
Testimony of R. F. Alexander	199	87
Conclusion of exceptions 1, 2, 3, 4, 5, 6, and 7	202	88
Plaintiffs' bill of exceptions	203	88
Bonds for writ of error, writ of error, and citation in error	205	89
Writ of error	215	94
Citation	218	95

½ In Supreme Court of the United States.

W. S. HUNNICUT, G. W. BARNES, L. W. KELLY; A. E. Watson, for himself and as guardian for his minor children, Irene, May, Carrie, and Churchill A. Watson; Sallie K. Bartlett, and her husband, Z. Bartlett; and W. H. Jones, plaintiffs in error,

versus

BALIE PEYTON, SALLIE B. PARKER; MARGARET Collier, and her husband, Robert Collier; Kate H. S. Stewart, and her husband, John W. Stewart; Joseph Balie Peyton, Joseph B. Matthews, Charles Matthews; Celina Douglas, and her husband, Seaton T. Douglas; Jessie Matthews, an infant; Clare Parker, Washington T. Parker, and John R. Parker, infants; John C. Peyton, Clare L. O'Reilly, Julia Ernst; Eliza Jackson, and her husband, James Jackson; and Thomas Barry, the husband, and John R. Barry, Locke W. Barry, David H. Barry, Jane Barry, and Peytona Barry, the children and only heirs at law of Sarah H. Barry, deceased, defendants in error.

1 *Petition.*

The United States circuit court, 5th circuit, in and for the western district of Texas, at Austin sitting.

Be it remembered that at a term of the circuit court of the United States, 5th circuit, for the western district of Texas, held at Austin, for the January term, A. D. 1877, Hon. W. B. Woods, circuit judge, presiding, among other the following proceedings were had:

UNITED STATES OF AMERICA:

Circuit court of the United States, 5th circuit, in and for the western district of Texas, at Austin sitting:

Hon. W. B. Woods, circuit judge; Hon. Thomas H. Duval, dist. judge.

Be it remembered that on the 25th day of August, A. D. 1874, that the plaintiffs, Bailie Peyton and others, filed their petition in action of trespass to try title against W. S. Hunnicutt & others.

Cause numbered 1552, and is in words, to wit:

(Endorsed, to wit:) United States circuit court, western district of Texas. Bailie Peyton and others, plaintiffs, vs. No. 1552, W. S. Hunnicutt and others, defendants. Trespass to try title. Filed in my office on the 25th day of August, A. D. 1874. M. Hopkins, clerk U. S. circuit court. This action is brought as well to try title as for damages. Stockdale & Proctor; Peeler, Montgomery & Fisher, attorneys for plaintiffs

2 In the circuit court of the United States for the fifth circuit and western district of the State of Texas, to January term, A. D. 1875.

Bailie Peyton, Sallie B. Parker; Sarah H. Barry, and her husband, Thomas Barry; Margaret Collier, and her husband, Robert Collier; Kate

H. S. Stewart, and her husband, John W. Stewart; Joseph Bailie Peyton, Joseph B. Mathews, Charles Mathews; Celina Douglass, and her husband, Seaton T. Douglass; Jessie Mathews, an infant under the age of twenty-one years, by Joseph B. Mathews, her next friend; and Clare Parker, Washington T. Parker, and John R. Parker, infants under the age of twenty-one years, by Susan M. Parker, their mother and next friend, who are citizens of the State of Tennessee; and John C. Peyton, who is a citizen of the State of Pennsylvania; and Clara L. O'Rielly, Julia Ernst, Eliza Jackson, and her husband, James Jackson, who are citizens of the State of Louisiana, plaintiffs, complaining of W. S. Hunnicutt; Sarah K. Bartlett, and her husband, Zenas Bartlett; L. W. Kelley, G. W. Barnes, William Killibrew, William R. Reagan; Armistead E. Watson, and Irene May Watson, Carrie Watson and Watson, whose Christian name is unknown, children of the said Armistead E. Watson and his late wife, Amanda Watson, deceased, and infants under the age of twenty-one years; David Frazier and J. Q. Cockrell, of
3 the county of Falls, and T. R. Webb, of the county of Robertson, and Clement R. Johns, W. Von Rosenberg, and Flavius Everett, of the county of Travis, all of whom are citizens and residents of the said State of Texas, and of the said western district thereof, defendants, represent that on the fifteenth day of February, A. D. 1874, the said plaintiffs were seized and possessed of the following-described tract of land, situated in the county of Falls, in the said State of Texas, and in the said western district thereof, viz:

Four leagues of land on the east of left bank of the Brazos River, known as the Gregorio Basquez survey of four leagues, situated about four leagues below a survey of seven leagues, made also for said Gregorio Basquez, the two composing and being his grant or concession of eleven leagues of land from the State of Coahuila and Texas, said four leagues of land being more particularly described as follows, to wit: Beginning at a stake, marked P, on said left bank of the Brazos River; running from thence north, 71 E., 10,200 varas, to a creek called Isaac's Creek, and at 20,220 varas to a stake set for the second corner; thence south, 19 east, 5,000 varas, to another stake for the third corner; thence south, 71 west, 18,320 varas, crossing again the aforesaid creek, to a stake on the Brazos River for the fourth corner; thence up the river to the place of beginning, covering an area of four leagues of land, or their equivalent, 100,000,000 square varas of land, fronting on said river,
4 and bounded on the three remaining sides, as stated in said grant when made, by the public domain.

And the said plaintiffs being so seized and possessed of the said land, and holding the same in fee-simple, the said defendants afterwards, to wit, on the 20th day of February, A. D. 1874, entered upon the said premises and ejected the said plaintiffs thereform, and unlawfully withhold from the said plaintiffs the possession thereof, to their damage in the sum of ten thousand dollars.

Therefore the said plaintiffs pray that process do issue, in conformity with law, to each of the said defendants; and that each of them be cited to answer this petition; and that the said plaintiffs have judgment for the recovery and the restitution of the said above described premises, as well as for their damages as aforesaid, and for the costs of this suit.

STOCKDALE & PROCTOR,
PEELER, MONTGOMERY & FISHER,
Attorneys for Plaintiffs.

5 *Answer of Zenas Bartlett & wife & Armistead E. Watson and minor children.*

Process issued to the several defendants, and on the 10 Dec., 74, the following answer filed, endorsed, to wit: "No. 1562. Bailie Peyton et al. vs. W. S. Hunnicutt et al. U. S. circuit court western district of Texas. Answers of Zenas Bartlett & wife & Armsted E. Watson & minor children. Filed Dec'r 10, 1874. M. Hopkins, clerk. Tho's Harrison, att'y."

In the circuit court of the United States for the 5th circuit and western district of the State of Texas.

BAILIE PEYTON ET AL.
vs.
W. S. HUNNICUTT ET AL. } No. 1551.

And now come the defendants, Sarah K. Bartlett, with her husband, Zenas Bartlett; Armstead E. Watson, and his minor children, Irene May Watson, Carrie Amanda Watson, and Churchill Armistead Watson, represented herein by their said father, and say that the matters and things alleged in the plaintiffs' petition, as therein set forth, are not sufficient in law to entitle them to ma'ntain their action, and of this they pray judgment.

And for answer, if required to answer, the said defendants say they are not justly of the wrong and trespass, or either of them, as alleged against them in the plaintiffs' petition, and of this they put themselves upon the country.

And for further answer they say they own jointly with others,
6 heirs of Churchill Jones, dec'd, in fee simple, by regular chain of transfer and title from the government down to them, a league of land described as follows:

In Falls County on the east side of the Brazos River, granted to John Marlin, beginning at the N. E. corner of labor No. 1, on the lower line of T. J. Chambers' line, to a stake from which an oak 8 in. dia. br's S. 60 E. 8 varas, and another oak, 12 in. dia. br's S. 23 W. 22 varas; thence S. 30 E. 5,470 varas, to a stake from which an oak 4 in. dia. b'rs N. 53 W. 6 varas, and an elm 12 in. dia. br's S. 10 E. 5 varas, crossing Musselrun Creek and another creek; thence S. 60 W. 5,000 varas, to the S. E. corner of labor No. 9, crossing Musselrun Creek; thence S. 30 W. 3,000 varas, running with the back line of labors Nos. 9, 8, 7, to the N. E. corner of league No. 7; thence S. 60 W. 1,000 varas, to the N. W. corner of said labor, on the back line of labor No. 2; thence N. 30 W. 730 varas, with the back lines of labors Nos. 2 and 7, to the place of beginning, comprising one league of land; and that they and those under whom they claim have had and held actual, adverse, exclusive, continuous, and disturbed possession of said league of land under a consecutive chain of title and transfer from the sovereignty of the soil down to them for more than three years next before the institution of this suit.

And they further say that they, and those under whom they claim,
have had and held actual, adverse, exclusive, continuous, and un-
7 disturbed possession of said league of land under title from the government for more than forty years next before the institution of this suit.

And these defendants therefore plead the limitations of three, five, ten, and forty years in bar of the plaintiffs' action.

THO'S HARRISON,
Att'y for Def'd'ts.

And they say that they have been in possession of said land in good faith for more than one year next before the institution of this suit, and they have placed thereon permanent and valuable improvements of the full value of thirty thousand dollars, of which a bill of particulars will be furnished hereafter, and they ask for compensation in case the plaintiff shall have judgment against them for the said land.

THO'S HARRISON,
Att'y for Def'ts.

Answer of T. R. Webb.

And afterwards, on January 6, 1875, the following answer was filed, endorsed, to wit: "No. 1552. Bailie Peyton et al. vs. W. S. Hunnicutt et al. Answer of T. R. Webb, filed January 6th, 1875. M. Hopkins, clerk."

Cause pending in the U. S. circuit court to Jan. term, A. D. 1875.

BAILIE PEYTON ET AL.
vs.
W. S. HUNNICUTT ET AL. } No. 1552.

Now comes the defendant, Thomas R. Webb, in the above cause, and demur'ing to plaintiffs' petition, says that the matters and things
8 therein alleged are insufficient in law to entitle them to maintain their said action or to compel this defendant to answer, and of this he prays the judgment of the court.

H. D. PRENDERGAST,
Att'y for Def't Webb.

And, answering, defendant denies all and singular the allegations of plaintiffs' petition, and says that he is not guilty of the several wrongs, injuries, and trespasses complained of in plaintiffs' petition; and of this he puts himself upon the country.

H. D. PRENDERGAST,
Att'y for Def't Webb.

Answer of William Killibrew.

And afterwards, to wit, on the same day, the following answer was filed, endorsed, to wit: "No. 1552. Circuit court U. S. Bailie Peyton et al. vs. W. S. Hunnicutt et al. Answer of W'm Killibrew, filed Jan'y 6th, 1875. M. Hopkins, clerk."

In the circuit court of the United States for the western district of Texas.

BAILIE PEYTON ET AL.
vs.
W. S. HUNNICUTT ET AL. } No. 1552.

And now comes the defendant, William Killibrew, and says the matters and things alleged in the petition of the plaintiffs are not sufficient in law to entitle them to maintain this action; and of this he prays judgment.

And for answer he says he is not guilty of the wrongs and injuries, or

either of them, as alledged in said petition against him; and of this
9 he puts himself upon the country, and he denies all and singular the allegations of the plaintiffs' petition.

And, further, he adopts the answer of Watsons & Bartletts, filed herein, and make' the same his own so far as he may be permitted to do so.

THO'S HARRISON,
Att'y for Def'ts.

And afterwards, on January 8th, 1875, the following answers were filed, endorsed, to wit: "No. 1552. Peyton et al. vs. Hunnicutt et al. Answer of Barnes, Kelley, Cockrell, & Frasier. Terrell & Walker, atty's."

Answer Barnes, Kelley, Cockrill, & Frazier.

In U. S. circuit court west. dist. of Tex., Jan'y, 1875.

BAILIE PEYTON ET AL. }
vs. } 1552.
W. S. HUNNICUTT ET AL. }

Comes now G. W. Barnes, L. W. Kelley, J. L. Cockrell, and David Frazier, and demur and say the petition is insufficient in law, & of this they ask judgment of the court.

TERRELL & WALKER,
Att'ys.

And said defendants, Barnes, Kelley, Cockrell, & Frazier, answering, say they are not guilty, & of this they put themselves upon the country.

TERRELL & WALKER,
Att'ys.

And afterwards, on the 8th January, 1875, the following answer was filed, endorsed, to wit: "No. 1552. Bailie Peyton et al. vs. W. S. Hunnicutt et al. In U. S. court at Austin. Answer of def'ts J. G. Cockrell & David Frazier. Filed Jan'y 8th, 1875. M. Hopkins, clerk. Goodrich & Clarkson, Marlin, Texas."

10 *Answer of J. G. Cockrell and David Frazier.*

In U. S. circuit court W. dist. of Texas.

BAILIE PEYTON ET ALS. }
vs. } 1552.
W. S. HUNNICUTT ET AL. }

Now comes the def'ts, J. G. Cockrill and David Frazier, by their att'ys, and demur'ing to pl't'ffs' petition herein filed, say that the same is not sufficient in law, and shows no cause of action against these defendants, and of this they pray the judgment of the court.

GOODRICH & CLARKSON,
Att'ys for Cockrill & Frazier.

And, answering pl'ffs' petition, these def'ts deny all and singular the allegations therein contained, and put themselves upon the country.

GOODRICH & CLARKSON,
Att'ys for Cockrill & Frazier.

And, defending the wrongs, injuries, and trespasses alleged in pl'tffs' petition against them, these defendants say they are not guilty of the same in manner and form as therein charged, & this they put themselves upon the country.

GOODRICH & CLARKSON,
Att'ys for Def'ts Cockrill & Frazier.

And afterwards, on January 8th, 1875, the following answer was filed, endorsed, to wit: "1552. Peyton et al. vs. Hunnicutt et al. Answer for C. R. Johns & Co. & Hunnicutt & his tenants. Filed January 8th, 1875. M. Hopkins, clerk."

11 *Answer C. R. Johns & Co., Hunnicutt and his tennants.*

In U. S. circuit court west. dist. of Texas.

BAILIE PEYTON ET AL.
vs.
W. S. HUNNICUTT ET AL. } No. 1552.

Comes C. R. Johns, Flav. Everett, W'm Von Rosenberg, & W. S. Hunnicutt, & demur & say the petition is insufficient in law, & of this they ask judgment.

TERRELL & WALKER,
Att'ys for Def'ts.

And the said defendants, Johns, Everett, Rosenburg, & Hunnicutt, say they are not guilty. Of this they put themselves upon the country.

TERRELL & WALKER, *Att'ys.*

And said Hunnicutt, for himself & all his tenants & those holding under him, answers herein & s ys they are not guilty, & of this they put themselves upon the country.

TERRELL & WALKER, *Att'ys.*

Amended petition.

And afterwards, on February 1st, A. D. 1875, by agreement of parties, cause was continued.

And afterwards, on May 13th, A. D. 1875, the following amended petition was filed, endorsed, to wit: "1552. Bailie Peyton et al. vs. W'm S. Hunnicutt et al. Amended petition. Filed May 13, '75. M. Hopkins, clerk. Copy of orig'l & am'd pet. iss'd to W. H. Jones, May 20, '75. M. Hopkins, clerk." Which is in words following:

In circuit court of the U. S. for the fifth circuit and western district of Texas, Austin, June term, 1875.

BAILIE PEYTON ET AL.
vs.
W'M S. HUNNICUTT ET AL.

12 Come now the pl'ffs, & by leave of the court amend their original petition and say that William H. Jones, a citizen of the State of Texas, residing in said county of Falls, in conjunction with

the def'ts herein, as named in original petition, on or about the said 20th day of February, 1875, entered upon a portion of the land described in original petition and ejected plaintiffs therefrom, and unlawfully withheld possession of said land from pl'ffs to their damage 10,000 dollars.

The premises considered, pl'ffs pray that said William H. Jones be made a party def't to this suit; that citation issue to him; that he be served with a certified copy of the original & this amended petition, and that on a final judgment pl'ffs judgment as prayed for in original petition.

STOCKDALE & PROCTOR &
PEELER, MONTGOMERY & FISHER,
Att'ys for Pl'ffs.

Answer of W. H. Jones.

And afterwards the following answer of W. H. Jones was filed, endorsed, to wit, "No. 1552. U. S. circuit court, western dist. of Texas. Bailie Peyton et al. vs. W. S. Hunnicutt et al. Answer of W. H. Jones. Filed June 5, '75. M. Hopkins, clerk." Which is as follows:

U. S. circuit court western district of Texas.

BAILIE PEYTON ET AL'S
vs.
W. S. HUNNICUTT ET AL'S.

13 And now comes the defendant, William H. Jones, and for answer to the plaintiffs' petition herein says he is not guilty of the wrongs and injuries and trespasses, or either of them, as alleged against him in said petition, and of this he puts himself upon the country.

And, further answering, he denies all and singular the allegations of the said petition.

And, further answering, he says that he and those under whom he claims have had and held actual, continuous, adverse, and exclusive, & peaceful and undisturbed possession of the land sued for more than three years next before the institution of this suit against him under color of title from and under the sovereignty of the soil down to this defendant.

And, further answering, he says that he and those under whom he claims have had like possession of said land, using, cultivating, and enjoying the same, and paying taxes thereon, for more than five years next before the institution of this suit, under deeds duly recorded.

And, further answering, he says that he and those under whom he claims have had and held like possession of said land, cultivating, using, and enjoying the same, and claiming the same for more than forty years next before the institution of this suit. Wherefore he pleads the
14 limitation of three, five, ten, and forty years in bar of the plaintiffs' action.

And he prays to be dismissed hence with his costs.

THO'S HARRISON,
For the Def't.

Further answer of W. H. Jones.

And afterwards the following answer and plea of W. H. Jones was filed, endorsed, to wit, "No. 1552. Bailie Peyton et al. vs. W. S. Hunnicutt. Filed Jan'y 6, 1876. M. Hopkins, clerk." Which is in words as follows:

Pending in U. S. circuit court, at Austin, Tex.

BAILIE PEYTON ET AL.
vs.
W. S. HUNNICUTT ET AL.

Comes W'm H. Jones, one of the def'ts in the above styled and numbered cause, and excepting to pl'tffs' petition therein filed, says the same is insufficient in law, and shows no cause of action against this def't; and, specially excepting to said petition, def't says the same contains no sufficient and certain description of the land sued for by pl't'ffs; wherefore def't prays judg't.

THO'S HARRISON &
GOODRICH & CLARKSON.
Att'ys for Def't.

And, answering said petition, this def't denies all and singular the allegations therein contained, & demands proof of the same.

THO'S HARRISON &
GOODRICH & CLARKSON,
Att'ys.

15 And, further answering said petition, this def't comes and defends the wrongs, injuries, and trespasses complained of by pl't'fs, and says that he is not guilty of the same in manner and form as therein charged against him, and of this he puts himself upon the country.

THO'S HARRISON, &
GOODRICH & CLARKSON
Att'ys for Def't.

And for special plea in bar of pl't'ffs' action this def't avers that for three years and more before the institution of suit against him by pl't'ffs, he and those whose estate he has and holds have had actual, adverse, open, notorious, exclusive, and continuous peaceable possession of the following-described tract of land, lying on the east margin of the Brazos River, in Falls County, in the State of Texas, being nine hundred and ninety-five acres out of a survey of one league and a quarter, known as the José Maria Sanchez survey, viz: Beginning at the southwest or lower corner of a 911-acre tract of land claimed by C. Jones on the east bank of the Brazos River; thence N. 62 E. 5,615 varas to a stake from which a mulberry 10 inches in dia. b'rs, N. 87, W. 6 varas, and a box elder 5 inches in dia. b'rs S. 86, E. 7 v'r's; thence S. 28 E. 1,013 varas; thence S. 60, W. 3,037 varas, and intersects the lower line of said Sanchez survey; thence S. 71 W. with the said lower line of Sanchez sur-
16 vey, to the bank of the river Brazos; thence up the river to the beginning; claiming the same under title and color of title by consecutive chain of transfer from the sovereignty of the soil down to him. Wherefore he says pl't'ffs are barred, and this he is ready to verify.

THO'S HARRISON &
GO DRICH & CLARKSON,
Att'ys for Def't.

And for further special plea in bar this def't avers that for five years and more before the institution of suit by pl't'ffs he and those whose estate he has and holds have had and held actual, adverse, exclusive, open, notorious, and uninterrupted peaceable possession of the afore-

said tract of land, cultivating, using, and enjoying the same, and paying all taxes due thereon, and claiming the same under a deed duly registered. Wherefore he says pl't'ffs are barred, and this he is ready to verify.

THO'S HARRISON &
GOODRICH & CLARKSON,
Att'ys.

And for further special plea in bar this def't avers that if pl't'ffs, or those under whom they claim, ever had right of entry into the said tract of 995 acres of land, hereinbefore described, the same hath not accrued at any time within ten years next before the institution of this suit by pl't'ffs. Wherefore he says pl't'ffs are barred, and this he is ready to verify.

THO'S HARRISON &
GOODRICH & CLARKSON,
Att'ys.

17 And further this def't avers that for forty years and more next before the institution of this suit by pl't'ffs, this def't and those under whom he claims have had and held actual, adverse, continuous, exclusive, and peaceable possession of the aforesaid tract of 995 acres of land, cultivating, using, and enjoying the same openly and notoriously, and claiming by lines and boundaries well known and defined, and by permanent, substantial enclosures; wherefore def't pleads the statute of limitation of ten years and prescription in bar of pl't'ffs' suit.

THO'S HARRISON &
GOODRICH & CLARKSON.
Att'ys for Def't.

2d answer of W. H. Jones.

Comes again the said def't, William H. Jones, and if his pleas in bar of pl't'ffs' action are not sustained, he suggests to the court that he has had and held adverse possession of the beforementioned tract of land for one year and more before the commencement of pl't'ffs' suit, in good faith, under a chain of title derived through mesne conveyances from José Maria Sanchez, who applied for and received from the government of Coahuila and Texas a grant of five leagues of land in the year 1833, a part of which grant was located on the Brazos River, near the
18 falls thereof, and includes the aforesaid tract claimed by def't; and def't avers that he and those whose estate he has and holds in said tract of 995 acres of land have made permanent and valuable improvements thereon during the time that he and those whose estate he has and holds have had possession of the same; and def't avers that said improvements are of great value, viz, of the value of six hundred and sixty dollars; an itemized bill of the particulars of said improvements is hereto attached marked "Exhibit A," and made a part of this plea; and def't prays that the issues tendered by this plea be submitted to the jury, and that he have such relief as by the statute of this State and the rules of this court is provided in such cases; and def't also prays judgment for the value of said improvements, also for general relief.

THO'S HARRISON &
GOODRICH & CLARKSON,
Att'ys for Def't.

EXHIBIT A.

List of improvements on land claimed by W'm H. Jones, viz:

30 acres of land cleared and in good state of cultivation	$360 00
One good box-house of pine lumber, with brick chimney.....	225 00
Cotton-house, corn-crib, & horse lot.....	75 00
Total	$660 00

THO'S HARRISON & G. & C., *Att'ys.*

19 *Further answer of A. E. Watson and children.*

On the same day the following answer was filed, endorsed, to wit: "No. 1552. Bailie Peyton et al. vs. W. S. Hunnicutt et al. Answer of A. E. Watson and children. Filed Jan'y 6th, 1876. M. Hopkins, cl'k." Which is in words following:

Pending in U. S. circuit court at Austin.

BAILIE PEYTON ET AL.
vs.
W. S. HUNNICUTT ET AL.

Come Irene May Watson, Carrie Watson, and Churchill A. Watson, minors, by A. E. Watson, their natural guardian, and A. E. Watson, def'ts in the above cause, and excepting to pl't'ffs' petition herein filed, say the same is not sufficient in law, and shows no cause of action against these def'ts.

And especially excepting to said petition, these def'ts say the same contains no sufficient and certain description of the land sued for by pl't'ffs; wherefore they pray judgment.

THO'S HARRISON &
GOODRICH & CLARKSON,
Att'ys for Def'ts.

And, answering said petition, these def'ts deny all and singular the allegations therein contained, and demand full proof of the same.

THO'S HARRISON &
GOODRICH & CLARKSON,
Att'ys for Def'ts.

And, further answering said petition, these def'ts come and defend the wrongs, injuries, and trespasses complained of by pl't'ffs, and
20 say they are not guilty of the same in manner and form as therein charged against them, and put themselves upon the country.

THO'S HARRISON &
GOODRICH & CLARKSON,
Att'ys for Def'ts.

And for special plea in bar of pl't'ffs' suit, these def'ts aver that for three years or more before the institution of suit by pl't'ffs, these def'ts, and those whose estate they have and hold, have openly, notoriously, and peaceably held actual, adverse, and exclusive possession of the following-described tract of land, lying on the east side of the Brazos River, in Falls County, Texas, being part of the John Marlin headright

league, viz: Twelve hundred and forty acres out of the S. E. corner of the John Marlin league-survey, beginning at the S. E. cor. of said league; thence S. 60, W. 3,737 varas, with the south line of said league, to the S. E. cor. of a 263-acre tract claimed by Z. Bartlett & wife; thence N. 30, W. 1,473 varas, to Bartlett's N. E. cor. in W'm H. Jones' south line; thence N. 60, E. 1,411 v'r's, to his S. E. cor.; thence N 28, W. 645 v'r's to cor. in W'm H. Jones' east line; thence N. 60, E. 2,326 v'r's, to the east line of the John Marlin league; thence S. 30, E. 2,118 v'r's, to the beginning. Also, of the following-described tract of land, situate in Falls County, on the east side of the river Brazos,
21 and a part of a league-and-a-quarter survey known as the José Maria Sanchez survey, viz: Three hundred and fifty-nine acres out of the S. E. cor. of the José Maria Sanchez league-and-a-quarter survey, beginning at the S. E. corner of said Sanchez survey, thence N. 19, W. 1,276, v'r's; thence S. 60, W. 1,920 v'r's, to the east line of the John Marlin league; thence S. 30, E. 945 v'r's, to the south line of the Sanchez survey; thence N. 71, E. 1,736 v'r's, to the beginning; claiming the same under title and color of title by consecutive chain of transfer from the sovereignty of the soil down to them, wherefore pl't'ffs are barred, and this these def'ts are ready to verify.

THO'S HARRISON &
GOODRICH & CLARKSON, *Att'ys.*

And for further special plea in bar of pl't'ff's action, these def'ts aver that for five years and more before the institution of suit by pl't'ffs these def'ts, and those whose estate they have and hold in said two tracts of land hereinbefore described, have openly, notoriously, peaceably, and continuously held actual possession of the same adversely and exclusively to all the world, cultivating, using, and enjoying the same and paying all taxes due thereon, and claiming the same under a deed duly registered; wherefore pl't'ffs are barred; and this these def'ts are ready to verify.

THO'S HARRISON &
GOODRICH & CLARKSON,
Att'ys.

22 And for further special plea in bar of pl't'ffs action these def'ts aver that if pl't'ffs ever had right of entry into the aforesaid two tracts of land, or either of said tracts, the same hath not accrued at any time within ten years previous to the institution of this suit by pl't'ffs, and this these def'ts are ready to verify.

THO'S HARRISON &
GOODRICH & CLARKSON,
Att'ys.

And, further, these def'ts aver that for forty years and more, previous to the institution of suit by pl't'ffs, these def'ts and those whose estates they have and hold in and to said two tracts of land, have had and held actual, adverse, exclusive, and peaceable possession thereof, cultivating, using, and enjoying the same, and openly and notoriously claiming the same, with lines and boundaries well known and defined; wherefore def'ts plead the statute of limitation of ten years and prescription in bar of pl't'ff's suit.

THO'S HARRISON &
GOODRICH & CLARKSON,
Att'ys.

Come again the said def'ts, Irene, May, Carrie, and Churchill A. Watson, by A. E. Watson, their natural guardian, and A. E. Watson, and if their pleas in bar are not sustained they suggest to the court that they
23 have had and held actual adverse possession of the aforesaid two tracts of land hereinbefore described for one year and more before the commencement of suit by pl't'ffs, in good faith, under a chain of title derived through mesne conveyances from José Maria Sanchez, who applied for and received from the Government of Coahuila and Texas, in 1833, a grant of five leagues of land, a part of which was located on the Brazos River, near the falls thereof, and includes a part of the first described tract of 1,240 acres and all of the second described tract of 359 acres; and these def'ts also hold and claim said first described tract of 1,240 acres and part of the second described tract of 359 acres under title derived through mesne conveyances from John Marlin, who applied for and received from the Government of Coahuila and Texas, in 1835, one league of land as a colonist in Robertson's colony; and def'ts aver that they and those whose estate they have and hold in said lands have made permanent and valuable improvements thereon during the time that they and those whose estate they have and hold have had possession of the same, and def'ts aver that said improvements are of great value, to wit, of the value of sixteen thousand five hundred dollars. An itemized bill of the particulars of said improvements
24 is hereto attached, marked "Exhibit B," and made a part of this plea. And def'ts pray that the issues tendered by this plea may be submitted to the jury, and that def'ts have such relief as by the statute and this court is provided in such cases; def'ts also pray for judg't for the value of said improvements and for general relief.

THO'S HARRISON &
GOODRICH & CLARKSON,
Att'ys for Def'ts

EXHIBIT B.

List of improvements on land claimed by A. E. Watson and children, viz:

400 acres of heavily-timbered land cleared and in good state of cultivation	$4,800 00
Fence inclosing same, of good split rails	2,000 00
Eleven rails high	2,000 00
One frame gin-house, 54 feet by 40 feet, covered with cypress shingles	1,350 00
Running-gear for same	200 00
One new Pratt gin-stand and band	250 00
One new McGowan iron press, largest size	350 00
10 box-houses of pine lumber, 18 × 18 f't, with shed-rooms on gallery to each, all covered with cypress shingles, good brick chimney to each, all new & in good repair	2,250 00
25 3 box-houses of cottonwood lumber, 24 × 18 f't, shed-room and gallery to each, and brick chimney to each, all covered with cypress shingles	600 00
Four frame houses, built of pine lumber, 22 × 18 f't, shed-room, gallery, and brick chimney to each, all covered with cypress shingles	1,000 00
15 log cabins, one with brick chimney, the others with stick-and-dirt chimneys	750 00
Good cotton-houses, corn-cribs, and horse-lots at each of the 35 houses occupied by tenants	2,250 00
14 wells, all well curbed, two of them with brick and the rest with c'dar and pine lumber	700 00
Total	$16,500 00

THO'S HARRISON, &
G. &. C.,
Att'ys.

Further answer of Zenos Bartlett & wife.

On same day the following answer was filed, endorsed, to wit: "No. 1552, Bailie Peyton et al. vs. W. S. Hunnicutt et al. Answer and plea of Z. Bartlett & wife. Filed Jan'y 6th, 1876. M. Hopkins, cl'k," which is in words following:

Pending in U. S. circuit court at Austin.

BAILIE PEYTON ET AL.
v.
W. S. HUNNICUTT ET AL.

26 Comes Zenas Bartlett and Sallie K. Bartlett, his wife, def'ts in the above entitled and numbered cause, and excepting to pl't'ff's petition, herein filed, say the same is insufficient in law and shows no cause of action; wherefore they pray judg't. And, specially excepting to said petition, these def'ts say that the same contains no sufficient and certain description of the tract of land sued for, and of this they pray the judg't of the court.

THO'S HARRISON &
GOODRICH & CLARKSON,
Att'ys.

And if these def'ts be required to answer further, they come and deny all and singular the allegations in pl't'ffs' petition contained, and put themselves upon the country.

THO'S HARRISON &
GOODRICH & CLARKSON,
Att'ys.

And, further answering, these def'ts come and defend the wrongs, injuries, and trespasses complained of in pl't'ffs' petition, and say that of the same they are not guilty in manner and form as therein charged against them, and of this they put themselves upon the country.

THO'S HARRISON &
GOODRICH & CLARKSON,
Att'ys.

And, further answering, these def'ts aver that they are rightfully in the possession and occupation of the following described tract of land situated in the county of Falls, State of Texas, viz: Two
27 hundred and sixty-three acres on the south line of the John Marlin league, to begin at the S. W. corner of a survey for A. E. Watson in the S. line of the league; thence N. 30 W. with Watson's line to his N. W. corner in W'm H. Jones' south line 1,475 v'r's; thence S. 60 W. with said Jones' south line 1,008 varas to the N. E. corner of a 41-acre tract of J. S. Jones; thence S. 30 E. with his east line 1,473 v'r's to the south line of said John Marlin league; thence N. 60 E. with said line 1,008 v'r's to the beginning. And def'ts aver that for three years and more before the institution of pl't'ff's suit these def'ts and those whose estate they have and hold in said tract of land have held actual, adverse, exclusive, uninterrupted, and peaceable possession thereof, claiming the same under title and color of title by consecutive chain of transfer from the sovereignty of the soil down to them; wherefore they say pl't'ffs are barred, and this def'ts are ready to verify.

THO'S HARRISON &
GOODRICH & CLARKSON,
Att'ys for Def'ts.

And, for further special plea in bar of pl'ffs' action, these def'ts aver, that for five years and more before the institution of pl't'ffs suit, these def'ts, and those whose estate they have and hold in the aforesaid tract of 263 acres of land, have openly, notoriously, peaceably, and continuously held actual adverse possession of the same, cultivating,
28 using, and enjoying the same, and paying all taxes due thereon, and claiming under a deed duly registered, and this they are ready to verify.

THO'S HARRISON &
GOODRICH & CLARKSON,
Att'ys.

And, for further special plea in bar of pl't'ffs' action, these def'ts aver that if pl't'ffs ever had right of entry into the aforesaid tract of land claimed by these def'ts, the same hath not accrued at any time within ten years before the commencement of this suit, and this the def'ts are ready to verify.

THO'S HARRISON &
GOODRICH & CLARKSON,
Att'ys.

And further, these def'ts aver that for forty years before the institution of suit by pl't'ffs, these def'ts and those under whom they claim have had actual, adverse, exclusive, uninterrupted, and peaceable possession of the aforesaid tract of 263 acres of land, cultivating, using, and enjoying the same openly and notoriously, and claiming with lines and boundaries well known and defined; wherefore they plead the statute of limitation of ten years and prescription in bar of pl't'ffs' action.

THO'S HARRISON &
GOODRICH & CLARKSON,
Att'ys for Def'ts.

Come again said def'ts, Sallie K. Bartlett, joined by her husband, Zenas Bartlett, and if these pleas in bar to pl't'ffs' suit are not sustained,
29 they suggest to the court that they have had and held actual, adverse possession of the aforesaid tract of 263 acres of land for one year and more in good faith before the commencement of suit by pl't'ffs, under and by virtue of a chain of title derived through mesne conveyances from John Marlin, who applied for and received in 1835, from the government of Coahuila and Texas, a grant of one league of land as a colonist in Robertson's colony, which said grant includes the land claimed by these def'ts, and is the separate property of said def't Sallie K. Bartlett, and def'ts aver that they and those whose estates the said def't Sallie K. Bartlett has, and held, have made permanent and valuable improvements on said land during the time that they and those whose estates they have and hold have had possession of the same, and def'ts aver that said improvements are of great value, to wit, of the value of three thousand six hundred dollars; an itemized bill of the particulars of said improvements is hereto attached, marked "Exhibit C," and made a part of this plea; premises considered, def'ts pray that the issues presented by this plea be submitted to the jury, and that they have such relief as by the statute and the rules of this court is provided in such cases; also pray for judgment for the value of said improvements, and for general relief.

THO'S HARRISON &
GOODRICH & CLARKSON,
Att'ys.

30 EXHIBIT C.

Statement of the improvements on the tract of 263 acres of land claimed by def'ts, Z. Bartlett & Sallie K. Bartlett as the separate property of Sallie K. Bartlett, viz:

100 acres of land cleared and in good state of cultivation, worth 12$ per acre..	$1,200 00
Enclosing same with good split-rail fence, eleven rails high	500 00
Four large double-box cabins, of pine lumber, with brick chimneys	1,200 00
Four wells curbed with sawed cedar lumber.....	300 00
Cotton-houses, corn-cribs, and horse lots at each of the 4 dwellings.....	400 00
Total.....	$3,600 00

THO'S HARRISON AND G. & H.,
Att'ys.

Answer of W. R. Reagan.

And afterwards, to wit, on the 29th day of Feb'y, the following answer was filed, endorsed, to wit: "No. 1552. Bailie Peyton et al. vs. W. S. Hunnicutt et al. Answer of def't, W. R. Reagan. Filed Feb. 29, 1876. M. Hopkins, cl'k." Which is in words as follows:

In the circuit court of the United States for the western district of Texas.

BAILIE PEYTON ET AL.
vs.
W. S. HUNNICUTT ET AL.

And now comes the defendant William R. Reagan, one of the defendants in said cause, and says he is not guilty of wrongs and injuries and trespasses alleged against him in the petition of the plaintiffs, or either of them, as therein set forth, and of this he puts himself upon the country.

THO'S HARRISON,
Att'y for the Def't.

31 *Appearance and order allowing Tho's H. Barry, husband, & children of Jane H. Barry, dec'd, to make themselves parties pl'ffs.*

On January 26, 1877, the following appearance of Tho's H. Barry, husband, etc., was filed, endorsed, to wit: "No. 1552. Bailie Peyton et al. vs. W. S. Hunnicutt et al. Filed January 26, 1877. M. Hopkins, clerk. Appearance of husband and children of Jane H. Barry, dec'd, making themselves parties pl'ff." Which is in words following:

In United States circuit court, western district of Texas. Jan'y term A. D. 1877.

BAILIE PEYTON ET AL.
vs.
W. S. HUNNICUTT ET AL. } No. 1552.

Come now the pl'ff Thomas H. Barry, husband of Jane H. Barry, now dec'd, and John R. Barry, Lock W. Barry, David H. Barry, Jane Barry, and Petona Barry, who are citizens of the State of Tennessee, residing in said State, and who are the only children of the said Sarah H. Barry, dec'd, and make themselves parties plaintiff in said cause, and

thereupon they allege that on the 6th day of May, A. D. 1876, said Sarah H. Barry departed this life at her home in said State, intestate; that there are no debts due from her or her estate; that no administration has been had on said estate, and that there is no necessity
32 for one; that they, the husband and children, are the only heirs at law of the said Sarah H. Barry, and that each of said children are of full age; that they adopt the pleadings & prayers of the original parties pl'ff.

PEELER, MONTGOMERY & FISHER,
Att'ys for Pl'ffs.

33 And afterwards, to wit, on January 26th, 1877, the following entry appears upon the minutes of court:

FRIDAY MORNING, *January 26th*, 1877.

Court met pursuant to adjournment.

Present, the Hon. Thomas H. Duval, judge presiding, and the officers of court, U. S. att'y, marshal, & clerk.

BAILIE PEYTON ET AL.
vs. } 1552.
W. S. HUNNICUTT ET AL.

Comes the plaintiffs, by their attorney, and suggests the death of Jane H. Barry, one of the plaintiffs in said cause, and leave was granted to make her husband and children parties.

Amended pleas of pl'ff.

And afterwards amended petition was filed, endorsed, to wit: "No. 1552. Bailie Peyton et al. v. W. S. Hunnicutt et al. Am. petition. Filed Feb. 5, 1877. M. Hopkins, cl'k."

In the United States circuit court at Austin, Jan'y term, 1877.

BAILIE PEYTON ET AL.
v. }
W. S. HUNNICUTT ET AL.

Now, at this term of the court come the plaintiffs, and, by leave of the court first had and obtained, amend their petition and amended petition heretofore filed, and for amendment aver and say:

First. That the lands mentioned in plaintiffs' petition, and for the recovery of which this suit is brought, are more particularly described, as follows:

Beginning at a stake marked "P" on the east bank of the river Brazos, in the county of Falls, State of Texas, at the point where the up-
34 per line of the Austin & Williams reserve, on the east side of said river, intersects said river; running thence with said upper line of the reserve N. 71° E. 20,220 varas to a stake, and crossing Isaac's Creek; thence S. 19° E. 5,000 varas to another stake for the third corner; thence S. 71° west 18,320 varas, covering again the aforesaid creek to a stake on the Brazos River for the fourth corner; thence up said river to the place of beginning, covering an area of four leagues, fronting on said river and lying within said Austin & Williams reserve, immediately below and adjoining said upper line of said reserve.

Second. Further amending, and by way of replication to several pleas of the statutes of limitation interposed by the several defendants herein, plaintiffs aver and say:

That Peyton B. Lytle, through and under whom they derive title by inheritance, labored under the disability of minority from the 4th day of October, A. D. 1850, until the 4th day of October, A. D. 1871, between which said periods the said Peyton B. Lytle was an infant under the age of twenty-one years; that the said Peyton B. Lytle, before, at, and after attaining his majority, labored under the disability of insanity, and was, up to the time of his death, on the 19th day of February, A. D. 1873, non compos mentis.

That by section 43, art. 12, constitution of 1869, which was ac-
35 cepted by the Congress of the United States on the 30th day of March, A. D. 1870, "the statutes of limitation of civil suits were suspended by the so-called act of secession of the 28th of January, 1861, and shall be considered as suspended within this State until the acceptance of this constitution by the Congress of the United States;" and that the possession of said defendants, or any of them, if any they ever had, which is not admitted, but denied, was begun and continued between the aforesaid dates, Jan'y 28, 1861, and March 30, 1870.

That plaintiffs and those under whom they claim have been in actual, adverse, continuous, and uninterrupted possession of the lands above described from the year 1850, and that said above-described possession was first interrupted by the several trespasses alleged in the original petition to have been committed by the defendants herein.

That by section 14, article 12, constitution of 1869, of force at the time said defendants, or any of them, took possession of the land in controversy, if possession they have ever had, which is not admitted, but denied, "married women, infants, and insane persons shall not be barred of their rights of property by adverse possession or law of limitation of less than seven years from and after the removal of each and all of their respective legal disabilities," and plaintiffs allege that seven years had not elapsed at the date of the said Peyton B. Lytle's death from
36 & after the removal of his disability of nonage, nor at the time said defendants, or any of them, took possession of the lands in controversy, if any possession they have ever had.

That Jonathan C. Peyton, pl'ff's ancestor, & the maternal grandfather of said Peyton B. Lytle, died in the year 1834, leaving surviving him his wife, Angelina B. Peyton, and two children, Alexander & Margaret Peyton. Alexander Peyton died in 1844, *that* having neither wife or children. That Margaret Peyton, then an infant, under twenty-one years of age, intermarried with J. T. Lytle, on the day of , 1849, and died in childbed on the 12th day of October, A. D. 1850, leaving surviving her husband, the said J. T. Lytle, and her son, the said Peyton B. Lytle. That Mrs. Angelina B. Peyton, on the day of , 1840, intermarried with one Eberly, who died, leaving his wife, the said Angelina, surviving him. That on the 15th day of March, 1860, the said Angelina B. Eberly (formerly Peyton) died, leaving surviving her, as her sole heir at law, the said Peyton B. Lytle; and that the said Peyton B. Lytle, an infant under the age of twenty-one years, at the date of the death of the said M'r's A. B. Eberly in March, 1860, became the sole and only inheritor of the estate of Angelina B. Peyton, as he had theretofore become the sole inheritor of the estates of the said Alexander Peyton and the said Mar-
37 garet Lytle (formerly Peyton).

And further amending, pl't'ffs' aver that defendants, since their

first entry upon the lands sued for at the time stated in original petition, have used, cultivated, and enjoyed the same to plaintiffs' damage twenty thousand dollars; and further, pl't'ffs say that the annual value of the rents and profits of the land in controversy, of which the def'd'ts wrongfully withhold the possession, is five thousand dollars.

Wherefore, premises considered, pl't'ffs pray as in original petition, and further pray for the possession of the land as herein described, and for the recovery of their damages, rents, & profits, as herein alleged.

STOCKDALE & PROCTOR,
PEELER, MONTGOMERY & FISHER.

Verdict and judgment.

38 And afterwards the following entry appears on minutes of the court, to wit:

SATURDAY MORNING, *February 17th*, 1877.

Court met pursuant to adjournment. Present, the Hon W. B. Woods, judge presiding, and the Hon. Thomas H. Duval, U. S. district judge, and the officers of court, U. S. att'y, marshal, and clerk.

BAILIE PEYTON ET AL.
v.
W. S. HUNNICUTT ET AL.

On this day came the parties, by their attorneys, and also came the jury heretofore empanneiled and sworn to try the issues of this cause, to wit, W. W. Archer, Frank Glasscock, Milton Wallace, J. A. Cunningham, Sam'l Norwood, B. F. Roe, John H. Walker, S. Bowers, D. C. Sandle, S. C. Moore, John Goodman, & Leslie Price, who, having heard the evidence given in this cause during the progress of its trial since the morning of the 7th, the argument of counsel, and the charge of the court, retired, under the charge of an officer of the court, to consider of their verdict, and finally returned into court, the following day, the verdict following:

We, the jury, find for the plaintiffs, and assess damages and rents at two dollars per acre per annum, from date of suit, August 24th, 1874, to Feb. 17, 1877, making two years 5 months and twenty-four days, against the following defendants, to wit: A. E. Watson and children, for 400 acres, one thousand nine hundred and eighty-one dollars & $\frac{37}{100}$ ($1,981.37); Z. Bartlett and his wife, Sarah K. Bartlett, for 100
39 acres, four hundred & ninety-five dollars & $\frac{31}{100}$ ($495.31); W. H. Jones, for 30 acres, one hundred and forty-seven dollars & $\frac{84}{100}$ ($147.84). We allow said defendants A. E. Watson & children, Z. Bartlett and his wife, Sarah K. Bartlett, and W. H. Jones, for improvements on said land, to wit: A. E. Watson and children, nine thousand dollars ($9,000.00); Z. Bartlett and his wife, Sarah K. Bartlett, two thousand dollars ($2,000.00), and for W. H. Jones, four hundred dollars ($400.00). We further value said land, occupied by said defendants, at ten dollars per acre, without improvements.

W. W. ARCHER, *Foreman.*

It is therefore considered by the court that the said plaintiffs, Bailie Peyton, Sallie B. Parker, Margaret Collier, and her husband, Robert Collier, Kate H. S. Stewart, and her husband, John W. Stewart, Joseph Bailie Peyton, Joseph B. Matthews, Charles Matthews, Celina

Douglass, and her husband, Seaton T. Douglass, Jessie Matthews, an infant, Clare Parker, Washington T. Parker, and John R. Parker, infants, John C. Peyton, Clara L. O'Reilley, Julia Ernst, Eliza Jackson, and her husband, James Jackson, and Thomas Barry, the husband, and John R. Barry, Lock W. Barry, David H. Barry, Jane Barry, and Peyton Barry, the children and only heirs at law of Sarah H. Barry,
40 deceased, do have and recover of the said defendants, W. S. Hunnicutt, William H. Jones, Sarah K. Bartlett, and her husband, Zenas Bartlett, L. W. Kelly, G. W. Barnes, William Killebrew, William R. Reagan, Armistead E. Watson, and Irene May Watson, Carrie Watson, and Churchill A. Watson, children of the said Armistead E. Watson, and his late wife, Amanda Watson, deceased, David Frazier, J. Q. Cockrell, F. R. Webb, Clement R. Johns, William Von Rosenberg, and Flavius Everett, the lands in controversy, to wit:

Four leagues on the east or left bank of the Brazos River, in the county of Falls, State of Texas, known as the Gregorio Basquez four-league grant, beginning at a stake marked "P," on the east bank of said river of Brazos, in said county of Falls, at the point where the upper line of the Austin & Williams reserve, on the east side of said river, intersects said river, running thence in the said upper line of said reserve north 71° east 20,220 varas to a stake crossing Isaac's Creek; thence south 19° east 5,000 varas to another stake for the third corner; thence S. 71° west, crossing again the aforesaid creek, to a stake on said river for the fourth corner; thence up said river to the place of beginning, covering an area of four leagues, fronting on said river, and lying within said Austin and Williams' reserve, immediately below and adjoining said upper line of said reserve.

41 That the said plaintiffs do have their writ of possession therefor against the said defendants and all persons holding under them since the institution of suit.

It is further considered by the court that the defendants, A. E. Watson, and his children, Irene May Watson, Carrie Watson, and Churchill A. Watson, do have and recover of the said plaintiffs herein the sum of seven thousand and eighteen dollars sixty-three cents, being the excess of the value of their improvements over and above the damages for the use and occupation of the land occupied by them, the said defendants, assessed by the jury.

It is further considered by the court that the defendants, Sarah K. Bartlett, and her husband, Zenas Bartlett, do have and recover of the said plaintiffs herein the sum of fifteen hundred and four dollars and sixty-six cents, being the excess of the value of their improvements over and above the damages for the use and occupation of the land occupied by them, the said defendants, assessed by the jury.

It is further considered by the court that the defendant, William H. Jones, do have and recover of the said plaintiffs herein the sum of two hundred and fifty-two dollars and sixteen cents, being the excess of the value of his improvements over and above the damages for the use and occupation of the land occupied by him, the said defendant, as assessed by the jury.

42 It is further considered by the court that the said plaintiffs, being non-residents of the State of Texas, and coming within the meaning of the act of this State of February 5th, 1840, 9 & 10 sections, article 3228 and 3229, of Hartley's Digest, and the defendants, Armistead E. Watson, and his children, Irene May Watson, Carrie Watson, and Churchill A. Watson, improvements exceeding the value of the use and occupation of the land in their possession, as assessed by the

jury, by the full sum of seven thousand & eighteen dollars and sixty-three cents; and the defendants, Sarah K. Bartlett and Zenas Bartlett, her husband, improvements exceeding the value of the use and occupation of the land in their possession, as assessed by the jury, by the full sum of fifteen hundred and four dollars and sixty-six cents; and the defendant William H. Jones, improvements exceeding the value of the use and occupation of the land in his possession, as assessed by the jury, by the full sum of two hundred and fifty-two dollars and sixteen cents, the writ of possession decreed herein shall be stayed, as to the said several defendants, as to the lands occupied by them, to wit, for the term of two years from the date of the rendition of this judgment, unless the said plaintiffs, or their legal representatives, shall pay to the clerk of this court, for the said defendants, respectively, the
43 amounts above stated, as to which, as above stated, they are severally and respectively entitled, being the excess as aforesaid of the value of their improvements over and above the value of the use and occupation of the land occupied by them respectively, as assessed by the jury.

And if the said plaintiffs or their legal representatives shall neglect for the term of two years to pay the said several sums the excess aforesaid, then the said defendants, Armistead E. Watson and his children, Irene May Watson, Carrie Watson, and Churchill A. Watson, Sarah K. Bartlett, and Zenas Bartlett, her husband, and William H. Jones, or their legal representatives, shall, within six months after the expiration of said term of two years, pay to the clerk of this court, for said plaintiffs, the value of the lands in possession of the said defendants, respectively, as assessed by the jury, to wit, ten dollars per acre, on which payment the said plaintiffs shall be forever barred of their writ of possession against the said defendants so paying for the value of the lands in their possession as aforesaid, and from ever having or maintaining any action whatever against the said defendants, their heirs or assigns, so paying for the lands occupied by them respectively as aforesaid, and recovered by the plaintiffs of them in this action.

And if the defendants, Armistead E. Watson, Irene May Wat-
44 son, Carrie Watson, and Churchill A. Watson, Sarah K. Bartlett, & Zenas Bartlett, her husband, and William H. Jones, or their legal representatives, shall not, within the time allowed them by the aforesaid act, to wit, the aforesaid six months, avail themselves of the benefit of the same, by paying the value of the land as aforesaid, then the writ of possession hereinbefore decreed shall be no longer stayed against them or such of them as may have failed to avail themselves of the benefit of the act aforesaid, and the said plaintiffs or their legal representatives may sue out their writ of possession.

It is further considered, ordered, and adjudged by the court, that the plaintiffs do have and recover of and from the defendants therein all their costs in this behalf expended or incurred, to be taxed, and for all of which execution may issue.

It is further ordered that the officers of court have process of execution for costs incurred respectively by either party.

Motion for new trial.

And afterwards the following motion was filed, endorsed, to wit, "No. 1552. Bailie Peyton et al. vs. W. S. Hunnicutt et al. Motion for new trial. Filed Feb'y 19, 1877. M. Hopkins, cl'k"; which is as follows:

45 In the United States circuit court for the 5th circuit and western district of Texas, sitting in the city of Austin.

BAILIE PEYTON ET AL.
vs.
W. S. HUNNICUTT ET AL. } No. 1552.

Now, on this day, February 17th, A. D. 1877, comes the defendants in the above cause, and moves the court to set aside the verdict of the jury in this cause this day rendered, because—

(1.) The court erred in overruling the exceptions of the defendants to the title of the plaintiffs, on the ground that the title of plaintiffs, if any, to the land is an equitable and not a legal title. (See bill of exceptions, No. 1.)

(2.) The court erred in its rulings in not holding, upon defendants' exceptions, that the plaintiffs' title to the land is void for want of a sufficient description of the land in their grant. (See bill of ex., No. 2d.)

(3.) The court erred in its rulings in admitting the testimony of Horatio Christman, and many other witnesses, over the objections of the defendants, to prove that the four-league block of the Basquez grant of land was surveyed and located upon the upper line of
46 the "Austin & Williams Reserve Line," there being no call in the Basqu'z grant for such a line as "Austin & Williams Reserve Line." (See bill of exceptions, No. 3.)

(4.) Because the court erred in its refusal to give to the jury the various instructions asked by the defendants. (See bill of exceptions, No. 4.)

(5.) The court erred in its instructions given to the jury. (See bill of exceptions, No. 5.)

(6.) The court erred in its ruling in instructing the jury that the Basquez title is older and superior to the Sanchez title. (See bill of exceptions, No. 6.)

(7.) The court erred in its rulings in failing to instruct the jury that they must confine themselves, in investigating the question of the location of the Basquez grant, to the calls in the grant. (See bill of exceptions, 7.)

(8.) The court erred in its rulings upon the statute of limitations of three, five, and ten years, as pleaded and set up by the defendants, A. E. Watson & his children, and by Z. Bartlett & wife and children, and William E. Jones. (See bill of exceptions, 8.)

(9.) The court erred in its rulings in failing to instruct the jury
47 on the statute of limitations of three, five, and ten years, as pleaded and set up by the defendants, A. E. Watson and children, Z. Bartlett, wife and children, and William E. Jones. (See bill of exceptions, 9.)

(10.) The court erred in its instructions to the jury on the point that defendants claim to be innocent purchasers for valuable consideration without notice. (See bill of exceptions, 10.)

(11.) The court erred in its rulings in its instruction given to the jury on the question of the defendants being innocent purchasers for valuable consideration without notice. (Bill of exceptions, No. 11.)

(12.) The court erred in its rulings in the admission of testimony. (See bill of exceptions, No. 12.)

(13.) The court erred in the following portions of its charge. (See bill of exceptions, No. 13.)

(14.) The verdict of the jury is contrary to the law as given by the court. (See bill of exceptions, No. 13.)

(15.) The verdict of the jury is contrary to the evidence on the question of the location of the Basquez grant. (See bill of exceptions, No. 15.)

(16.) The verdict of the jury is contrary to the evidence on the
48 question of the statute of limitations of three, five, and ten years, as set up and pleaded by the defendants, A. E. Watson and his children, Z. Bartlett, wife & children, and W'm E. Jones.

(17.) The verdict of the jury is contrary to the law and the evidence.

(18.) The verdict of the jury is contrary to the evidence. (See bill of exceptions No. 17.)

(19.) The conduct of the jury was irregular in the finding of their verdict, and during their deliberation. (See bill of exceptions, 18.)

(20.) And especially the court erred in its final instructions to the jury after the general charge, in reference to a question of the juror, Cunningham. (See bill of exceptions, 19.)

GOODRICH & EVANS,
Att'ys for Defendant.

Order overruling motion for new trial.

Motion submitted and judgment entered as follows:

BAILIE PEYTON ET AL.
vs. } 1552.
W. S. HUNNICUTT ET AL.

THURSDAY MORNING, *Feb.* 20, 1877.

On this day came on to be heard the motion of def'ts for a new trial in this cause.

The parties appeared by A. J. Evans & Turrell & Walker for the defendants, and Peeler Montgomery & Fisher for the plaintiff.

The motion having been read by the defendants' counsel, A. J. Evans, was submitted without argument and overruled by the court.

49 *Extension of time to def'ts to file bills of exceptions.*

And afterwards the following entry appears upon the minutes of this court.

BAILIE PEYTON ET AL.
vs.
W. S. HUNNICUTT ET AL.

THURSDAY MORNING, *March* 1, 1877.

Upon application of the defendants, plaintiffs making no objection, it is ordered that the defendants, A. E. Watson for himself, and as guardian for his minor children, Irene, May, Carrie, & Churchill A. Watson, Z. Bartlett and Sallie K. Bartlett, and W. H. Jones, have five days from the date hereof in which to execute and file a new writ of error bond.

It is ordered in this cause that the def'ts have until the 1st day of March, 1877, in which to present their bills of exception in this cause, for the signature of the judge, and filing said bills in this court, and the time mentioned in rule 33 of the court is under the circumstances of this cause extended until March 1st.

To the making of the order of March 1, 1877, by which the time (within which bills of exception may be signed by the judge presiding at the trial) was extended to March 1, 1877, to cover the signing of certain bills of exception, numbered from 1 to 7 inclusive, presented by defendants' counsel, February 28th, 1877, signed by the judge, plaintiffs by their counsel in open court protested and excepted upon the
50 ground that by rule 33 (rules of practice in circuit court, 5th circuit western district of Texas) which is as follows: "Thirty-three. No bill of exceptions will be signed unless presented to the judge within five days after the close of the trial, unless further time be allowed by the court, provided that all bills of exceptions shall first be submitted to the opposing counsel, if he be in attendance at the term of the court." The time cannot, after the expiration of the time therein mentioned, be extended by the district judge so as to cover the signing of bills of exception, contrary to said rule, no previous order of the court or argument of counsel in relation thereto having been made. These objections being overruled by the court, pl'ffs' counsel then and there excepted and prayed that this bill of exceptions be signed and sealed, and made part of the record, which is accordingly done March 1, 1877.

[L. S.] T. H. DUVAL,
U. S. Judge.

51 *Charge of the Court.*

U. S. circuit court western district of Texas, Jan. term, 1877.

BAILIE PEYTON ET AL'S
v.
W. S. HUNNICUTT ET AL'S. } Trial commenced Feb'y 7, '77.

WOODS, *Circuit Judge:*

GENTLEMEN OF THE JURY: The plaintiffs bring this action to try their title to the certain lands and tenements, situate in this western district of Texas and described in their amended petition as follows:

Beginning at a stake marked "P" on the east bank of the river Brazos, in the county of Falls, State of Texas, at the point where the upper line of the Austin & Williams reserve, on the east side of said river, intersects said river, running thence with said upper line of the reserve N. 71° E. 20, 220 varas to a stake and crossing Isaac's Creek; thence south 19° east, 5,000 varas to another stake for the third corner; thence south 71° west, 18,320 varas, crossing again the aforesaid creek to a stake on the Brazos River for the fourth corner; thence up said river to the place of beginning, covering an area of four
52 leagues, fronting on said river, and lying within said Williams & Austin reserve, immediately below and adjoining said upper line of said reserve.

A. E. Watson and his children, Irene May Watson, Carrie Watson, and Churchill A. Watson, defend for the following tract of land, parcel of the four-league tract above described, and which you will find particularly described by metes and bounds in their answer, to which I refer you.

W. H. Jones, another defendant, defends for another parcel which he describes in his answer, and Zenas Bartlett and Sallie K. Bartlett, his wife, defend for another parcel, which they specially describe in their answer.

The defendants whom I have named, plead first, the general issue, by which they deny the plaintiffs title, and deny that they have been guilty of the trespasses charged against them in the plaintiffs' declaration. They plead further, that they have had actual, adverse, open, notorious, exclusive, continuous, and peaceable possession, claiming title and color of title by consecutive chain of transfer from the sovereignty of the soil, for a period of more than three years before the commencement of this suit, of the parcels of land for which they defend respectively.

They also plead that they have had a similar possession for
53 five years before the commencement of this suit of the tracts for which they respectively defend, cultivating and enjoying the same, paying all taxes due thereon and claiming the same under a deed duly registered.

They further plead that the plaintiffs' right of entry to said respective tracts of land, if they ever had any, did not accrue to them within ten years next before the commencement of this suit, and that they, and those under whom they claim, have for forty years before the bringing of this suit had actual, adverse, continuous, exclusive, and peaceable possession of the said tract for which they defend respectively, claiming by well-known lines and boundaries; and they therefore plead the limitation of ten years and prescription as a bar to the plaintiffs' suit. The other defendants, W. S. Hunnicutt and others, whose cases are submitted to you, simply plead the general issue, and nothing more, that is to say, they deny that they have trespassed upon any lands to which the plaintiffs have title.

This statement advises you of the issues between the parties which you are called upon to try.

The suit itself is an admission as well as a claim upon the part of the plaintiffs that the defendants are in possession of the land in controversy, and it is conceded by defendants that they are in possession.

54 In order, therefore, to a recovery by the plaintiffs, they must show that they have a good title to land sued for. If they fail in this they cannot recover, even though the defendants have no title whatever. A party in possession of land without any title himself, has a right to hold it against all the world except the true owner; or as the law is sometimes stated, the plaintiff in the action of ejectment must recover on the strength of his own title, and not on the weakness of the title of his adversary.

The first question, then, to which you will give your attention is this: Have the plaintiffs by their proofs established their title to the land described in their petition, and which for convenience I shall call the Basquez tract?

It is a fact conceded in the case, that the plaintiffs in this suit are the heirs at law of the late Johnathan C. Peyton, to whom, as they claim, the title to the Basquez tract was originally extended, and that they have the same right to prosecute the suit that Johnathan C. Peyton would have, were he living, and were he the plaintiff in this action. In other words, it is admitted that all the right and title of Johnathan C. Peyton has descended to the plaintiffs in this case,
55 subject to the right of the defendants to set up their several defences as they have pleaded them.

The plaintiffs claim that they have shown a good title to the Basquez tract, in their ancestor, Johnathan C. Peyton, and consequently in themselves by descent from him.

The first item of evidence offered by the plaintiffs consists of what

appears to be an ancient document, purporting to convey title to eleven leagues of land on the left bank of the Brazos, to Johnathan C. Peyton, as attorney in fact for Gregorio Basquez.

This document consists of several parts:

(1.) The application of Gregorio Basquez to purchase eleven leagues of land under the 24th article of the colonization laws of March 24, 1825. This application is dated Sep. 28, 1830.

(2.) A concession by Santiago del Valle to Basquez for eleven leagues of land, dated March 11, 1831.

(3.) A power of attorney from Basquez to one Jayene Hartz, with power of substitution, dated Sep. 20, 1831.

(4.) An act of sale by Basquez to Hartz, of the concession, dated Sep. 22, 1831.

(5.) Substitution, by Hartz, of Johnathan C. Peyton as attorney in fact, dated March 2, 1832.

(6.) Sale, by Hartz to Peyton, of the concession, dated also March 2, 1832.

(7.) Application of Peyton, as attorney for Basquez, for an order of survey, dated Sep. 21, 1833.

56 (8.) An order of reference to Austin and Williams, empresarios, to locate the grant within their colony, and if obtained, then an order to the principal surveyor of the colony, F. W. Johnson, to make the survey, dated Sep. 21, 1833.

(9.) The consent of Austin and Williams, dated Sep. 23, 1833.

(10.) The report of Johnson, the surveyor, without date.

(11.) Certificate of comparison.

(12.) Extension of title to Johnathan C. Peyton, as attorney in fact for Basquez, by Luke Lesassier, alcalde, dated Oct. 7, 1833.

The description of the lands contained in this title it is necessary to consider.

The report of the surveyor commences thus:

"M'r Alcalde & Commissioner: The lands that I have surveyed, pursuant to your order foregoing, for the attorney of Gregorio Basquez, M'r Johnathan C. Peyton, are situate," &c.

The eleven leagues, it appears, were surveyed in two tracts. The first tract consisted of seven leagues, which are described by the surveyor as "seven leagues upon the left bank of the Brazos, above the Bexar road, and adjoining and above a tract of four leagues, which I surveyed for José Antonio Manchaca." Then follows a minute description of the seven leagues by metes and bounds.

57 The remaining four leagues, which is the tract with which we have to do in this case, is thus described: "Four leagues upon the same bank of the river, about four leagues below the first tract.

"The second tract of four leagues," the survey continues, "has the situation, limits, boundaries, and land-marks as follows, to wit: Situated upon the left bank of the river Brazos, and beginning the survey at a stake upon the said bank marked "P," with a line course north 71° east, at 10,200 varas crossed a creek called Isaacs' Creek, and at 20,220 varas a stake was set for the second corner; from this point another line runs south 19° east 5,000 varas, and another stake was set for a third corner; from this point runs another line, course south 71° west 18,320 varas, crossing again the said creek to the aforesaid river Brazos, where another stake was set for the fourth corner; from this point the river was followed upwards to the beginning point; and contains a plane

area of four leagues of land, or what is the same, 100,000,000 square varas, adjoining the river and vacant lands on the other side."

You will observe, gentlemen of the jury, that the description of the Basquez four-league survey in the title papers is not so precise as in the description given in the plaintiff' petition. The description in
58 the petition places the beginning corner of the four-league survey at a stake marked "P," on the Brazos River, where the upper line of the Austin & Williams reserve on the east side of the river intersects the river. The title papers fix the beginning corner at a stake marked "P," on the left bank of the Brazos River, about four-leagues below the seven-league survey.

I may it is a fact abundantly proved in the case, and not disputed, that the upper line of the Austin & Williams reserve is only 16,320 varas below the seven-league Basquez survey, or nearly 3,700 varas higher up the river than the upper line of the Basquez four-league tract would be if placed where the title papers place, to wit, about 4 leagues, or 20,000 varas, below the seven-league Basquez survey.

In other words, the plaintiffs claim in this suit that their four-league Basquez tract is about 3,700 varas higher up the river than the description of the tract in the title papers would place it.

It has been claimed by the defendants that the title papers were void because of the vague description of the lands they purported to convey—beginning at a stake marked "P," on the left bank of the Brazos, about four leagues below the seven-league tract—but we were of opinion
59 that if there had been an actual location of the grant upon the ground the uncertainty of the deed would be cured thereby. But we are also of opinion that unless there has been an actual survey of the Basquez four-league tract upon the ground, the plaintiffs cannot maintain by virtue of their deed alone, a title to the land which they claim in this suit. In other words, the plaintiffs cannot claim their 4 leagues of land 3,700 varas higher up the river than their title papers would place it, unless their four leagues have been actually located by actual survey at the place where they claim it.

And we are further of opinion, and so instruct you, that if the surveyor actually surveyed the four leagues on the ground at a point 3,700 varas above the beginning point called for by the title papers, the mistake or inaccuracy of the surveyor would not vitiate the title of the pl'ffs under their deed, but their title would be good to the land actually set off to them on the ground by the surveyor, provided the same land had not already been appropriated by an older title.

We instruct you, then, that the paper title introduced by the plaintiffs vested in Johnathan C. Peyton the title to the Basquez four-league tract where the plaintiffs claim it to be, provided the surveyor
60 actually surveyed and set apart to him substantially that identical land.

You will therefore proceed to inquire whether the Basquez 4-league tract was actually surveyed upon the ground. The plaintiffs claim that it was; the defendants say it was not; and this issue you must decide. On entering upon the inquiry, you are to note the fact that the papers introduced by plaintiffs recite the fact of the survey. It was the duty of the surveyor to make the survey and to make a report thereof. Having reported the fact that he made the survey, the presumption is that he did so, and if there were no other evidence in the case upon this point than his report, it would be your duty to find that a survey had actually been made. In other words, the report of the surveyor of his survey makes a prima facie case in favor of the sur-

vey. But this prima facie case may be rebutted by other evidence. The defendants have introduced much testimony tending, as they claim, to overturn the presumption of the fact of the survey, and the plaintiffs much to sustain it.

I will not undertake to rehearse the evidence pro and con upon this point, but call your attention to some of the principal points relied on on both sides.

61 (1.) The plaintiffs say that their upper line was placed by the surveyor upon a line which had already been run and fixed, namely, the upper reserve line east of the Brazos of the Austin & Williams reserve. They claim that this line was run and marked by Moore, and that he, as deputy surveyor, under Johnson, principal surveyor, and by Johnson's direction, actually placed the upper line of the four-league Basquez tract upon the upper reserve line. The upper reserve line they assert is where they now claim the upper line of the 4-league Basquez.

The plaintiffs claim to have shown the one line was placed upon the other.

62 (2.) They claim to have shown by the declarations of Moore, who actually made the survey as they assert it, that he placed the Basquez line upon the upper reserve line.

(3.) They claim to have shown that the upper reserve and upper Basquez 4-league lines were identical, by evidence of a common understanding and reputation in the neighborhood where the lands lie, formed before any controversy about the lines.

(4.) They claim to have shown that the upper and lower Basquez lines have actually been found upon the ground, the upper one being identical with the upper reserve line, and the lower one 5,000 varas below and parallel with it.

(5.) They claim to have shown that Johnson, the principal surveyor of the Austin and Williams colony, made a rough map, of which he caused two copies to be made, which showed that the reserve and upper Basquez lines were identical, and that *if* these maps, if now in existence, would be accurate maps.

(6.) They claim to have shown that the Austin and Williams reserve had 60,000 varas front on the Brazos River; that commencing on the lower reserve line, which is ascertained and well known, and allowing first 5,000 varas for the Ruiz grant and 50 from labor surveys,

63 48 of which Moore actually surveyed, and then allowing 5,000 varas from to the Basquez front, its upper line would fall where they now claim it to be upon the ground, to wit, upon the upper reserve line.

(7.) They claim to have shown the existence of the upper reserve line by the declarations of the deceasd surveyor, Moore, that he actually surveyed said upper reserve line, and of the testimony of Col. Johnson, the principal surveyor, that he directed him to make such survey; that there was a reputation in the neighborhood, that there was such a line; that old inhabitants had spoken of it; that it was delineated on the maps made by Col. Johnson, and of which he directed copies to be made, which maps have been lost; and that the line running off from the river in the direction north 71° east, which was a direction taken by no other line run at that early day, had been actually traced for a distance of many miles, extending beyond the limit to which any present survey would reach, and showing Moore's peculiar mark made upon the trees by a hack-knife.

This is what the plaintiffs claim to have shown, as corroborating the

report of the surveyor that their 4-league Basquez tract was actually run off upon the ground where they now claim it to be.

64 On the other hand, the defendants claim to have shown conclusively that no such survey of the Basquez 4-league grant, as claimed by the plaintiffs, was ever made.

They deny, in the first place, that the reserve line east of the Brazos was ever, in fact, run before the date claimed by the plaintiffs as the time when the Basquez grant was surveyed.

They claim to have shown that the field-notes of Moore, who was, as the plaintiffs claim, the surveyor of the 4 league Basquez tract, bear date the 11th of May, 1833, and that at that date Moore was at San Felipe de Austin, two hundred miles from the land; that according to the plaintiffs' own evidence the survey could not have been made till after Williams gave his consent to the location of the survey within the reserve, which was in May, 1833, and that after that date Moore never returned to the region where the land lay. They claim, therefore, that the survey reported by him was mere chamber work, and that the survey never could have been made upon the ground.

They claim further to have produced the field-notes of Moore, and a copy of the same made by Johnson, of the meanders of the Brazos, showing the distance from the shoals of the Brazos to the upper reserve line, and that according both to the original meanders of Moore and the copy of the same made by Johnson the said reserve line is

65 placed several thousand varas below where the plaintiffs claim it to be.

They claim further that taking the course and distances of the survey of the Basquez, as reported by Moore, that the distance to Isaacs Creek, called for on the north line of the survey, carries the survey*or* some 1,400 (?) varas beyond Isaacs Creek, and that the distance called for on the lower line instead of ending with the east bank of the Brazos River where it should, run' across the river 1,600 varas.

They claim further to have shown that it was the invariable custom of Moore, and that such were his orders from his chief, Col. Johnson, always to mark a corner by called for fixed objects, such as bearing-trees, when there were trees in the neighborhood. That there were trees on the bank of the Brazos, where the alleged survey of the Basquez tract by Moore purports to begin, and that as the report of the survey calls for no bearing trees, but simply for a stake marked "P," that a strong presumption is raised that Moore did not actually make the survey upon the ground, but projected it in his office at San Felipe, 200 miles distant.

I should state here that the fact that the tract does not answer

66 to all the calls will not of itself avoid the grant if the tract was actually surveyed and can be identified, but you may consider the discrepancies between the calls and the natural objects called for as evidence tending to show that the survey was not, in fact, made. And it is for this purpose the defendants claim to have introduced this evidence, and claim*s* also to have shown that Moore was a careful and accurate surveyor, and that if he had made an actual survey upon the ground no such discrepancies would exist.

The defendants claim to have shown that at the distance of about 1,247 varas above the Blue Shoals, the point where Johnson's copy of the meanders of the Brazos places the reserve line, there is found no line upon the ground old enough to be the reserve line, and running out from the river north 71° east, the angle claimed for the reserve line, and that this line is several thousand varas below the upper re-

serve and upper Basquez line, as claimed by the plaintiffs, and they claim that the evidence of Johnson's copy of the meanders fixes their line on the real upper reserve line.

These are some of the principal facts relied on by respective parties to show that the Basquez grant was, and that it was not, surveyed
67 and marked upon the ground. Whether the claims set up by the parties have been established by the proof, it is for you to determine; you are to remember what evidence has been introduced and decide what the evidence proves.

If, taking the prima facie case as made by the report of Moore, adopted by Johnson, the evidence on both sides still leaves the preponderance in favor of an actual survey; if the proof satisfies you that one or more of the calls in the grant has been identified upon the ground; if, in short, the plaintiffs have been able to satisfy you where on the ground the survey places their grant, then we instruct you that the title-papers introduced by plaintiffs vested a good title in Johnathan C. Peyton for the land thus identified.

But if, carefully scrutinizing all the evidence and allowing proper weight to the prima facie case made by the report of Moore, you should be satisfied that no survey was actually made by which the Basquez grant can be identified to be the land derived by the plaintiffs, then we instruct you that the title-papers conveyed no title to the land in controversy.

If you find for the plaintiffs on this issue, there will be other
68 matters for you to consider; but if you find for the defendants, that will end your deliberations, and you will return a verdict for the defendants.

We have given you these instructions, keeping in mind the fact that *the* some of the defendants have introduced in evidence what is known as the Sanchez title, which they claim to be an older title, in fact that the Basquez title. But we instruct you that if the plaintiffs have been able to identify the land which the Basquez title purports to convey, that title is the older and better one.

If you find for the plaintiffs on the issue which we have just submitted to you, then you will proceed to consider other defences set up by the defendants.

Some of the defendants set up special defenses. These defendants are W. H. Jones, A. E. Watson and his children, and Z. Bartlett and wife.

One of these special defenses we have already noticed; that is, that the Sanchez title, under which , this claim is the older and therefore better title; you will remember what we have just said on that point.
69 The other defenses are the statutes of limitation of 3 years, 5 years, and 10 years.

It is claimed that Johnathan C. Peyton died in 1834, leaving a wife and either three or four children surviving him, and that in 1844 or 1845 one of his sons, Alex. P., died, leaving issue, a daughter Margaret; that before the year 1848 the other children of Johnathan C. Peyton died unmarried and without issue. If this be true, we instruct you that in 1848 M'r's Peyton, the widow of Johnathan C. Peyton, became vested by inheritance from her late husband, Johnathan C. Peyton, and from her children, with either $\frac{5}{6}$ or $\frac{7}{8}$ of his entire estate, according as you shall find the fact whether three only or four of the children of Johnathan C. Peyton survived him. The other one-sixth or one-eighth vested in Margaret Peyton, daughter of Alexander P., and descended to her son, Peyton G. Lytle.

The defendants W. H. Jones, Z. Bartlett & wife, and A. E. Watson and his children claim that their occupancy of the Sanchez title commenced before the death of Johnathan C. Peyton, and that, as to that title, the statute has never ceased to run as to all the plaintiffs and those under whom they claim; that, as to the possession under the
70 Martin title, it has run against M'r's Eberly since 1835, and against M'r's Little (late Margaret Peyton) since 1849, and has continued to run against her minor child, Peyton G. Little, after her death in Oct., 1860.

According to law of Texas the limitation does not run against infants or married women, but we also say that after it has begun to run it continues to run, notwithstanding an intervening disability, and that one disability cannot be tacked upon another. But if a party has entered into possession of a tract of land, and the statute has begun to run in his favor, the running of the statute will of course be interrupted by and interruption of the possession, either actual or constructive.

I do not understand that there is any dispute between the parties as to these propositions of law. The controversy is as to their application to the facts in the case.

The claim that possession was taken of the Sanchez tract before J. C. Peyton's death, and that the statute has been running against all the plaintiffs and those under whom they claim, cannot be maintained, unless it is shown that the part possessed was within the lines of the Basquez grant, as claimed by the plaintiffs.

71 The facts, as I understand the defendants to claim them, are that in 1855, under the Martin title, and in 1856 or 1857, under the Sanchez title, they took actual possession of their lands lying within the conflict.

From that date the statute of limitation began to run in their favor for the lands embraced within their title as against the Basquez title. If three years elapsed before they were ousted by a superior possession, then their occupancy for three years makes a complete bar to any recovery by the plaintiff.

But the plaintiffs claim that in May, 1857, before the defendants had been in possession for the period of three years of any of the lands within the conflict, their possession was interrupted by the entry upon the Basquez grant of James Martin as the agent for M'r's Eberly.

If you find this fact to be as the plaintiffs claim, that James Martin entered upon the Basquez grant in 1857 as the agent for M'r's Eberly, claiming title to the whole in her name, we instruct you that for that time the possession of the defendants, they holding under a junior title, was restricted to the lands actually occupied by them, and could not be extended by construction to the bounds called for by their paper-title.

From Jan. 28, 1861, to the 30th of March, 1870, the statute of
72 limitations in this State was suspended. No extension therefore of the actual possession of defendants between these dates would avail them unless held for three years after the statute had again commenced running, and before the commencement of this suit.

73 *Defendants' 1st bill of exceptions.*

In the United States circuit court for the fifth circuit and western district of Texas, sitting in the city of Austin, in said western district of Texas.

BALIE PEYTON ET AL.
vs.
W. S. HUNNICUTT ET AL. } No. 1552.

Be it remembered that on the trial of this cause, and after the jury were empanelled and sworn, and the pleadings read, the plaintiffs moved the court to admit in evidence to the court and jury, as evidence of their ownership of the land sued for, the following title-papers, that is to say, certified copies of—

First. A power of attorney, with power of substitution, from Gregoria Basquez to Jaime Hartz, dated the 20th day of September, eighteen hundred and thirty-one (1831).

Power of attorney, with power of substitution, from Gregoria Basquez to Jayne Jayme Hartz.

Second stamp—twelve reales.

Legalized for the State of Coahuila and Texas for the years 1828, '29, '30, & 31.

By commission:

JESUS DE LOS SANTOS COY.

In the town of Nacogdoches, on the 20th day of September, 1831, before me, the citizen Manuel de los Santos Coy, sole constitutional alcalde of the aforesaid town, and instrumental witnesses hereinafter named, besides those of my assistants with whom I act agreeably to the law, appears the citizen Gregorio Basquez, of this jurisdiction, in his proper person, whom I declare to know, and who says: That by these presents he executes, gives, and confers all his power, full, ample,
74 and sufficient, whatever may be required by law and is necessary or may be of value, to Don Jayme Hartz, of this jurisdiction special, that he may in representations and use of the rights and interests which pertain to the grantor, he will solicit of the person or persons authorized to that effect, the possession and titles of eleven leagues of land, which he has obtained from the supreme government of the State by way of purchase, with the authority to empower him to solicit in the place or places which best suits him, together or separate, according to the tenor of the concession of the date of 11th March of this year, which I declare to have seen.

And the grantor has placed in the hands of his attorney that he may do and perform, in the name of the grantor, all whatsoever he might do were he actually present, since for all as aforesaid, annexed, concerning, incident, and pertaining, he gives and confers the most ample and extensive power, without any limitation whatever, and without which, by default of any clause or requisite, he gives to this power all the force and effect, whatever the same may be, as if the same was herein literally written and inserted.

That he may appoint substitutes, revoke the same and appoint others anew, with free, frank, and general administration in form, since for all

he relinquishes by this act whatever the law permits, and acknowledges all whatsoever his attorney may do or perform by virtue of this power of attorney, binding his person and property in every
75 form, and renounces all laws in his favor.

In testimony whereof thus he executes, as he does not know how to write, he makes the sign of the cross; there were present, as instrumental witnesses, the citizens Martin Ybarvo, Antonio Menchaca, and Carlos Gil, residents of this town, and those of my assistants in the form prescribed by law, to which I certify.

MANUEL DE LOS SANTOS COY.

Sign of the cross of—

GREGORIO BASQUEZ. +

Ass. witness: JESUS DE LOS SANTOS COY.
Ass. witness: VITAL FLORES.

This testimonio agrees with the original which remains in the archive of the public documents of this municipality, which goes truly and legally compared and corrected, and at its transcribing, correction, and comparing the same, there was found the same instrumental witnesses who were present at its execution, besides those of my assistants, with whom I act in the form prescribed by law, to which I certify.

MANUEL DE LOS SANTOS COY.

Ass. witness: JESSE DE LOS SOTOS COY.
Ass. witness: VITAL FLORES.

Second. An act of sale by Gregorio Basquez to the said Jayme Hartz of his concession in sale, which had been made to him by Santiago del Valle, on the 11th day of March, eighteen hundred and thirty-one (1831), bearing date September 22nd, eighteen hundred and thirty-one (1831).

Act of sale, Basques to Hartz.

Third stamp—two reales. [STAMP.] For the years 1830 & 1831.

76 MOST EXCELLENT SIR: Gregorio Basquez, a native of the City of Mexico, and now residing in this town, with the due respect to your excellency I would represent, that understanding the provisions of the 24th article of the colonization law of the state, of 24th March, 1825, and in virtue of being a native Mexican, with due respect to your excellency, I pray you be pleased to grant me in sale eleven leagues of land on the vacant territory of this department, with the privilege of selecting them together or separate, or in distinct places, as may suit me, with the understanding that I offer to settle and cultivate them as customary, that it may be to the purpose within the term which the law prescribes, making the payments of its value on the terms and at the places designated in the 22nd article, and to sustain the right of the country, and of the state, and all other that may be in conformity with the laws which govern us and under their protection.

I pray your excellency be pleased to do as aforesaid, in which I will receive favor.

Nacogdoches, September 28th, 1830.

GREGORIO BASQUEZ.

LEONA VICARIO, *March 11th*, 1831.

In conformity with the 24th article of the colonization law of 24th March, 1825, I grant by sale to the petitioner the eleven leagues of land

that he solicits on the vacant territory of the state at the place that may best suit him, after the commissioner of the supreme general
77 government shall have set apart a sufficiency of land for the payment of the debt due by the state to the federation. The commissioner for the partition of land in the enterprise to which pertain the land solicited by the petitioner, and in his default, or that the same not being embraced by any enterprise whatever, the 1st or sole alcalde of the respective jurisdiction, will comply with the orders on the subject and put him in possession of said leagues, and issue the proper title, previously classifying the quality of them, for according to their designation he shall satisfy the state, for the payment of which I concede him the times designated in the 22nd article of the aforesaid law.

Let a copy of his petition and this decree be given by the secretary of state to the interested party, so that upon application with it to the commissioner it may have the desired effect.

LETONA.

SANTIAGO DEL VALLE,
Secretary.

A copy of the original on file in the archives of the office of the secretary of state, in my charge, from whence it was taken by orders of his excellency the governor.

Leona Vicario, March 14th, 1831.

SANTIAGO DEL VALLE, *Sec'y.*

78 Second seal—twelve reales.

Furnished for the State of Coahuila & Texas, for the terms 1828 and '29.

By the commissioner.

JESUS DE SANTOS COY.

In the town of Nacogdoches, the 22nd day of the month of Sep'r 1831, before me, citizen named de los Santos Coy, sole constitutional alcalde of the said town, and the instrumental witnesses, whose names appear at the end of this document, assisting me to authenticate the same in the absence of a notary appointed conformably to law, appeared the citizen Gregorio Basquez, of this district, in whom I placed confidence and with whom I am personally acquainted, and said that embracing the right which the 27th article of the colonization law of the state of the 24th of March, 1825, gives him, he applies for the present order of sale by which he has sold really and publicly in fee and forever Don Jayme Hartz of this vicinity, as follows:

A grant of the supreme government of the state dated 11th of March, of the present year, of eleven leagues of land located on the public domain in this department, which was sold him by virtue of the 24th arti, cle of the colonization law above cited with the same conditions, privileges, and obligations which were imposed upon the petitioner-
79 for whose possession and title he has granted a special power to the same purchaser, dated the 20th of the present month and the term of our Lord already given, for the price and sum of one hundred and fifty dollars, which he acknowledges having received in current coin to his satisfaction, wherefore he renounces the laws of non numerata pecunia no entregoe pmeba, it being an express condition that the purchaser shall pay the costs of the surveyor, commissioner, paper, sealing, enrolling of the titles, and the claims of the state for the usual price of

the lands conformably to its quality, and for all the legal charges that may be considered as an augmentation of the price mentioned above in the sale by the said commissioner, and declared that this is the just value of the said lands; but if they are worth more he makes a surplus and remainder, a pure, more perfect, and irrevocable gift and donation to the purchaser and surrenders the right called inter vivos; and for the security and surety of this sale he pledges the personal property that he now has or may have, and with it he submits himself to the law and jurisdiction of the judges and justices of the state and particularly to those in this town, to whom he gives the same competency for exercising every right and executive obligation as if their degrees were
80 authoritative judicial decree. He renounces his proper judicial domicil and vicinity, the law si cum beresit de jurisdictione omnium judicum with the ["general"] of the right in respect to form.

In testimony of which, as the petitioner was not able to write he made a cross, the citizens Martine Ubarvo, Antonio Manchaca, and Charles Gil, present and living in the said town, instrumental witnesses with myself and those assisting me in the form prescribed according to law, to which I hereby certify.

MANUEL DE LOS SANTOS COY.

Sign of the cross of GREGORIO BASQUEZ. +

De assistentia: JESUS DE LOS SANTOS COY.
De assistentia: VITAL FLORES.

I have compared this testimonial with its original which is placed in the archives of the public instruments of this municipality and which is faithfully and legally corrected and compared, and at the copying, correcting, and comparing of which were present as instrumental witnesses the same as are attached to this grant, besides those assisting me authenticating in the form prescribed by law, to which I certify.

MANUEL DE LOS SANTOS COY.

De assistentia: JESUS DE LOS SANTOS COY.
De assistentia: VITAL FLORES.

81 Third: A substitution of Johnathan C. Peyton by Jame Hartz, to be the attorney of Gregoria Basquez, bearing date March 2nd (1832), eighteen hundred and thirty-two.

In the town of San Felipe de Austin, on the 2nd day of March, 1832, before me the citizen Horatio Chrissman, 1st alcade of the municipality, and witness Jayme Hartz, a resident of Nac'doches, exercising the authority conferred on him by the preceding power of attorney, consents to substitute it in all and for all, on Johnathan C. Peyton, of this jurisdiction, to whom he relinquishes and accordingly does relinquish, binding the property bounden in said power of attorney, and agreeing to the substitution in form and signs it, whom I declare to know, there being as witnesses, Don Amos Gates, and Samuel Gates, residents of this colony.

HORATIO CHRISSMAN.

Ass. witness: FRANCIS ADAMS.
Ass. witness: HYMAN HERTZ.
OLIVERJONES.

82 Fourth. An act of sale of the concession of Basquez, by Jayme Hartz to Johnathan C. Peyton, bearing date March 2nd (1832), eighteen hundred and thirty-two.

Sello segundo—doce reales.

Furnished for the State of Coahuila and Texas for the terms 1828 and 29, 30, and 31.

WILLIAMS.

In the town of San Felipe de Austin, 2nd of March, 1832, before me, the citizen Horatio Chriesman, first alcalde for this municipality and the instrumental witnesses which were named at the conclusion of this paper, besides those assisting me to give it authenticity in the absence of a notary, appeared the citizen Jaeme Hartz of Nacogdoches, in whom I have confidence and with whom I am personally acquainted, and said he acknowledges the present agreement, and has sold really and publicly, in fee and forever, to the citizen Johnathan C. Peyton, of this vicinity, a grant of the supreme government of the state, dated 11th of March, the year last passed, of eleven leagues of land located on the public domain of this department, which was sold to the citizen Gregorio Basquez, of the municipality of Nacogdoches, by virtue of the 24th article of the colonization law of the 24th of March, 1825, which, by a public instrument of sale dated 22nd September, 1831, and one which is authentic, having seen it myself, he transferred, confirmed, and sold the said grant of eleven leagues of land to your petitioner, by which possession and title he granted him especial power under date of
83 the same month and year, and in which I have confidence, having seen it also, and which is hereby transferred to the purchaser, and which documents your petitioner will place in his hands, and he hereby concedes to him the said grant of eleven leagues of land upon the same conditions, privileges, and obligations that were imposed upon the said Gregorio Basquez by the governor, for the price and sum of five hundred dollars, which he acknowledges to have received in the current coin to his full satisfaction; upon which he renounces the laws non numerata pecunia no entrego e pueba, it being upon the express condition that the purchaser will pay the charges of the surveyor, commissioner, paper-sealing, recording of title, and claims of the state for the original price of the land conformably to its quantity, and for all other legal charges which may be considered as an augmentation of the said price for which he has sold the said grant; and he declares that this is the just value of the said lands, but if they are worth more or less *they* excess or *or* surplus he makes a gift or donation to the purchaser pure, more perfect, and irrevocably; and for the sanctity and security of this sale he binds his person and property that he has or may have, and with them submits himself to the jurisdiction and judgment of the tribunal which in this matter ought to adjudicate, and he gives them the same competency for exercising every right and executive obligation as if they were decrees authoritatively passed and properly adjudicated.

84 He renounces all the laws which could favor him and prevent his general renunciation. In testimony of which I grant this and name with myself the instrumental witnesses, D'n Amos Gates and Samuel Gates, citizens of this *mei*nicipality, to which I certify as well as those assisting me.

HORATIO CHRIESMAN.
HYMAN HARTZ.

De Assistencia: OLIVER JONES.
De Asistentia: FRANCIS ADAMS.

TREASURY DEPARTMENT, OFFICE OF COMM'R OF REVENUE.
Sept. 19th, 1840.

Received of H. W. Raglin the sum of twelve hundred dollars in the promissory notes of the government, being the amount of dues upon the within fifty labors of arable land and ten hundred and twenty-five labors of pasture land granted to Gregorio Basquez, title dated Oct. 7, 1833, as appears from the certificate of John P. Borden, commissioner of the gen'l land office, now on file in the office; payment made by the administratrix of J. C. Peyton, att'y.

$1,200.

E. L. STICKNEY,
Acting Comm'r of Rev.

I, Harrison Owen, county clerk of records in and for the county of Robertson, do certify that a true copy of the within is entered on record in my office at Franklin this 3d day of April, A. D. 1841.

HARRISON OWEN,
Co. Rec. R. C.

Recorded in book C, pages from 110 to 25. Paid by B. Gillespie, my fees, par funds.

85 Fifth. Grant or title from Luke Lesasieur, alcalde, &c., of eleven leagues of land (including the four in controversy) to Jonathan C. Peyton, attorney of Gregorio Basquez, of date eighteen hundred and thirty-three (1833).

Third stamp—two reales.

Legalized for the State of Coahuila and Texas for the years 1828, '29, '30, '31, '32, & '33. Williams.

In the town of San Felipe de Austin, on the 7th day of October, 1833, I, the citizen Luke Lesassier, constitutional alcalde of this town and its jurisdiction, in the exercise of the authority which has been conferred on me by the supreme government of this State by decree dated at Leona Vicario, on the 11th March, 1831; and in consideration of the sale executed by the aforesaid supreme government in favor of Gregorio Basquez, a native of the city of Mexico, then residing in the town of Nacogdoches, of eleven leagues of land, as will appear from the superior decree of sale, dated in the aforesaid Leona Vicario on the 11th day of March, 1831, and presented by his attorney, Jonathan C. Peyton, as will be seen on pages 3 and following of this proceeding; and in attention to the superior order of his excellency the lieutenant-governor, dated on the 29 day of January of this year, and circulated by the chief of this department on the 19th of last February, repealing the provisional decree of the supreme government of the State in relation to those citizens to whom had been granted land not being permit-
86 ted to take possession of them until the commissioner-general of the nation shall have made a reservation; and inasmuch as none of those eleven leagues applied for by the interested party are at any of those points ceded to the federation by the aforesaid order and in view of the approval granted by the empresarios Mess'rs Austin and Williams, written upon the 1st page of this proceeding, as the lands belongs to the enterprise of said empresarios—in conformity with the colonization law of the State of 24th March, 1825, and in the name of the State, I confer upon and put the aforesaid attorney of the citizen Gregorio Basquez in real, virtual, personal, and actual possession of

eleven leagues of land, the same which he has asked for and that the government has sold to him upon the Brazos River; the situation, lines, limits, and corners of the same are delineated in the notes of survey made by the principal scientific surveyor, Francis W. Johnson, on pages two, and following of this proceeding, with the figure thereof shown in the map hereunto annexed. The aforesaid lands, by said notes of survey, are, in the opinion of the surveyor, to be, of the arable class in two leagues, and of the pasture class in nine leagues.

I, the commissioner and alcalde aforesaid, in the exercise of the authority conferred on me by the law, do declare, in accordance with said classification, he shall satisfy the State in the sum of one thou-
87 sand two hundred dollars, according to the provision in the 24th article of the aforesaid colonization law, dated on the 24th March, 1825, and in the terms designated in the 22d article of the same law, under the penalties therein established; being notified that within one year he shall construct permanent landmark at each angle of the land; that he shall cultivate the same in conformity with the provisions in the aforesaid law, and scrupulously comply with all ordained in it, and other enactments on the subject.

Therefore, by virtue of the authority vested in me by the aforesaid decree of the supreme government of the State and other orders from the same government on the subject, by the law and pursuant instructions which guide me, I issue the present title, and order that an authenticated copy be taken of it, and let it be delivered to the interested party, that he may possess, use, and enjoy the lands which has been sold to him, his children, heirs, and successors, or whoever of him or of them may have cause, interest, or right to represent, for such is the will of the State. Given at the town of San Felipe de Austin, on the day and date above written, which I sign, with assisting witnesses, according to law.

L. LESASSIER.

Ass. witness, W. T. LIGHTFOOT.
Ass. witness, C. C. GIVENS.

In the same connection the plaintiffs also offered in evidence the original testimonio of their title:

88 The plaintiffs also offered evidence tending to show that the original testimonio of their title were, in April, 1841, spread upon the record of the proper office in Robertson County, Texas, within which county the lands in controversy were then situate, and subsequently offered evidence tending to show a possession by them under said title for more than five years, commencing in 1857, and the payment of taxes on said lands.

To the admission of all these papers the defendants in open court, by their attorneys, at the time they were offered in evidence, objected, and moved the court to exclude the same from the court and jury on the following specific grounds, that is to say: First, that all the above papers, if title at all, show but an equitable and not a legal title in Jonathan C. Peyton, the ancestor of plaintiffs.

Second. That the description of the land in the title or grant is too vague and indefinite to convey any land, and the grant is void as to the four-league block; or, in other words, the grant is void for insufficient description of land therein, especially as to the four-league block.

These exceptions of the defendants being duly considered by the court, on argument, were overruled by the court, and said aforesaid papers admitted in evidence to the court and jury, and thereupon then and there

the defendants excepted to the rulings of the court in the premises
89 and here tenders bill of exceptions, and in due form prays the same be approved and signed by the court, and enrolled and filed, &c., &c., which is accordingly done, &c., &c.

Feb. 28, 1877.

[SEAL.] W. B. WOODS,
U. S. Judge.

Defendants' 2d bill of exceptions.—Filed March 1, 1877.—*M. Hopkins, cl'k.*

BAILIE PEYTON ET AL. }
v. } 1552.
W. S. HUNNICUTT ET AL. }

Be it remembered that on the trial of this caase the pl't'ffs offered to read in testimony to the jury the deposition of Horatio Chriesman, as follows:

Answers and depositions of Horatio Chriesman, a resident citizen of Burleson County, Texas, to the accompanying interrogatories and cross interrogatories propounded to him in the above-entitled cause, taken before Thomas M. Hunt, clerk of the district court of Burleson County, Texas, in accordance with the accompanying commission:

To the 1st direct interrogatory he answers: I am a citizen of the State of Texas, residing in the county of Burleson. I arrived the 4th day of June, A. D. 1822, at the mouth of the Colorado River, in what is now the State of Texas. I first settled in what is now Austin County, Texas, about ten miles above San Felipe on the west side of the Brazos River.

To the 2nd direct interrogatory he answers: My age is 77 y'rs the 13th day of August, 1874. I was born in Salem, Farquire County,
90 Virginia, on the 13th day of August, 1797.

To the 3rd direct interrogatory he answers: I was a surveyor for many years. I commenced surveying as a surveyor under General William Rector, surveyor-general, in Missouri, in the fall and winter of 1816, and surveyed about three years under him. I commenced surveying in Texas on the 10th day of Oct., 1823, as principal surveyor for Stephen F. Austin, for his first colony, commencing on the Brazos River about four miles below the town of Washington, in what is now Washington County; and for several years I was engaged in surveying in Austin's first colony from the San Antonio road down to the mouth of the Brazos River, on both sides of said river. I continued surveying, either as principal or deputy surveyor, in Austin's different colonies until the annexation of Texas to the United States. Since that time I was appointed surveyor of Burleson County, about the year 1871, and continued in that office about one year.

To the 4th direct interrogatory he answers: In the fall of 1833 I traced a portion of the lower line of said reserve on the east side of the Brazos River, commencing where the said line intersects the river, running with said line N. 71° E. the length of the lower line of the Francisco Ruiz 4-league grant, which was identical with said reserve line. I got my information as to the location of the lower line of said reserve from Col. F. W. Johnston, William Moore, deputy surveyor, and
91 the citizens living in the vicinity of said line. Said William Moore informed me that he ran the upper line of the reserve on the east side of the Brazos River; that said line began on the east bank

of the Brazos River, a short distance below the falls, running N. 71° E. My information was, and is, that the reserve lines were run by F. W. Johnston and William Moore in or about the year 1832 and 1833.

To the 5th direct interrogatory he answers: I have had experience as surveyor in said reserve. Some time in the fall of the year 1833 Col. F. W. Johnston, principal surveyor, ordered William Moore and myself to make a survey of a portion of the lands in said reserve on the east side of the Brazos River, beginning at the upper line of the said Francisco Ruiz 4-league grant on the east bank of the Brazos River, ordering me to lay off the front on the river in "4 labor tracts" fronting one thousand (1,000) varas on the river, and running back for quantity; and these surveys were to include all the river front between the upper line of the Ruiz and the lower line of the Gregorio Basquez 4-league grants. While I was engaged in surveying the front said Moore was engaged in surveying the land back or east of said "4 labor tracts," each covering two of my fronts and connected with them. John H. Money, my deputy, was assisting me in doing this work. We commenced surveying in said reserve about the latter part of October or first part of November,
92 1833, and stopped work on or about the 8th day of Feb'y, 1834, as per a copy of a portion of my said work certified to by the commissioner of the general land-office herewith enclosed with my depositions and marked "Exhibit A," which shows the time we left off the work surveying, and I am sure we were engaged at it for three months or more. During the progress of our work said Moore and myself frequently met and conversed together on the subject in which we were engaged. Moore and myself left the reserve about the same time.

To the 6th direct interrogatory he answers: I did know William Moore. I first became acquainted with said Moore in the town of San Felipe, about the year 1831. He was a surveyor. He is dead; has been dead for many years. He died east of the Brazos. I cannot state the place. To the best of my recollection he died before the annexation of Texas to the United States.

To the 7th direct interrogatory he answers: I personally knew Johnathan C. Peyton. I first became acquainted with him about the 8th day of June, 1822, at the mouth of the Colorado River, Texas. Said Peyton, his wife, Samuel M. Williams (afterwards empresario with Stephen F. Austin), and many others came over in the same vessel. Afterwards, in 1832, I lived in San Felipe with said Peyton and family and said Williams. Said Peyton is dead; he died in San Felipe in 1834.

93 To the 8th direct interrogatory he answers: I know nothing (except from information) of the location of the said 4 leagues of land granted to said Basquez. I will, in answer to a subsequent question, state all the information I possess on the subject. I made no surveys, measurements, or calculations with a view to the location of the said grant.

To the 9th direct interrogatory he answers: During the time that said William Moore and myself were engaged surveying in the said reserve, as before stated, and perhaps before that time, he informed me that he had made the survey of the said "4-league Basquez grant;" that the upper line of the said grant began on the east bank of the Brazos River at the point where the upper line of the reserve began, and that the upper line of the Basquez ran N. 71 E. with the reserve line the full distance of the Basquez line; and that the upper line of the "Basquez" and the upper line of the "reserve" were the same to the extent of the Basquez line.

To the 10th direct interrogatory he answers: This interrogatory is fully answered by my answer to the last interrogatory (9th).

To the 11th direct interrogatory he answers: I have answered this interrogatory in my answers to previous interrogatories with the exception of the last clause thereof. The surveys made by Moore and myself, as before stated, were for the purpose of forming a dense and compact settlement on the river.

94 To the 12th direct interrogatory he answers: The said Moore and myself were each engaged making surveys within the reserve at the time specified; each one having been directed in his surveys by F. W. Johnston. I was directed by said Johnston to make the front surveys on the east bank of the Brazos—to begin said surveys, as before stated, at the upper line of the "Ruiz grant," and terminate them at the lower line of the "Basquez grant." I began the surveys, as directed, on the upper line of the "Ruiz grant," and proceeded to survey the front in "4-labor tracts," fronting 1,000 v'r's on the river and running back for quantity, and numbering each tract from 1 to 48. When I had completed tract "No. 48," the said Moore came to my camp and informed me that I was approaching the neighborhood of the lower line of the "4-league Basquez grant." And not knowing where the said line was (nor had I time to hunt it), and being out of provisions, I did not finish the front surveys, but stopped at "No. 48," which, according to a map (hereinafter mentioned), left a vacancy of 2,000 v'r's between "tract No. 48" and the lower line of the Basquez grant. I am certain I did not cross Basquez's lower line in making these front surveys. That was what I was particularly guarding against.

To the 13th direct interrogatory he answers: As I have already answered, between the upper line of the "Ruiz" and the lower line of the "Basquez" grants.

To the 14th direct interrogatory he answers: As before stated, I know the location of the Francisco Ruiz 4-league grant, in Robertson

95 County. Its lower line begins on the east bank of the Brazos River, at the point where the lower line of the reserve begins, and runs on the said reserve line N. 71° E. with said line the full distance of its call, and is located within the reserve. I ran the lines of the said "Ruiz 4-league grant" to find its upper boundary, in order to commence the "front surveys," before mentioned.

To the 15th direct interrogatory he answers: I have answered this question in my last answer.

To the 16th direct interrogatory he answers: The Basquez grant is located on the east side of the Brazos, on the upper line of the reserve, as I was informed by William Moore. The Ruiz grant is located in the "reserve," on the lower line thereof, on the east bank of the Brazos. The map will show each to be 5,000 v'r's wide, and the distance between the two 50,000 v'r's, according to the true map.

To the 17th direct interrogatory he answers: The reserve is 60,000 v'r's in length, and I understand is about 40,000 v'r's in width.

To the 18th direct interrogatory he answers: As hereinbefore stated, the course of the upper and lower lines of the "reserve," on the east side of the Brazos River, runs N. 71° E. from the river; and the smaller surveys, fronting the Brazos in the "reserve," made by me, have their lines parallel with the upper and lower lines of the "reserve."

To the 19th direct interrogatory he answers: As before answered, I have heard said Moore speak of the "Basquez 4-league survey," and its location with reference to the upper line of said reserve.

96 I do not recollect the words of M'r Moore, but he said to me, in substance, that he had run the "lower line" of said grant, its

course being the same as the course of the "upper line." The width of the survey is 5,000 v'r's, as shown by the map. Moore and I conversed on the subject at the time of making the surveys in the "reserve," and probably at other times.

To the 20th direct interrogatory he answers: I knew several of the surveyors and chain-carriers in "Austin & Williams' colony." Among the surveyors were F. W. Johnston, William Moore, and John H. Money. Among the chain-carriers were William Duty, George Darr, William Isaacs. Isam G. Belcher, and Wright, and others not now recollected. Of all these, Col. Frank M. Johnston and myself are the only survivors so far as I know and believe. Belcher died in Washington County, and Darr in Burleson County. I don't remember where Isaacs died. Wright died in Austin County, and Duty, I think, on the Colorado.

To the 21st direct interrogatory he answers: I know nothing more of matters and things pertaining to this question than what I have stated, except that I know that there were weed prairies on the east side of the Brazos River, and near the same. I remember to have shot a deer in one of said weed-prairies while I was surveying one of the "4-labor tracts." I am unable to state whether there was timber
97 or prairie at the places where the upper and lower lines of the Basquez grant struck the river, having never been at either of those places.

HORATIO CHRIESMAN.

To all of which, and especially to the 4th, 9th, and 19th answers, the def'ts, by counsel, except, on the ground that it is hearsay testimony, and cannot be received to prove the specific fact sought to be established, viz, that said Basquez grant was in fact surveyed by Moore on the reserve line, or at any other particular place; but the court overruled said objections, and permitted said answers to be read in evidence, to which ruling def'ts, by counsel, then and there except and pray a bill of exceptions, which is granted, signed, and made part of the record.

Feb. 22, 1877.

W. B. WOODS, [SEAL.]
U. S. Judge.

Def'ts' 3d bill of exceptions.—Filed March 1st, 1877.—M. Hopkins, clk.

In the honorable United States circuit court for the 5th circuit & western district of Texas, sitting at Austin, in said district.

BAILIE PEYTON ET AL. *vs.* W. S. HUNNICUTT ET AL. } No. 1552.

Be it known that on trial in this cause the plaintiff moved the court to allow them to read in evidence the deposition of one Horatio Chriesman, taken in accordance with law, and by whom they proposed to prove that the surveyor William Moore, who it is claimed made the survey of the Basquez four leagues in the first instance, and who is
98 now dead, told the witness that he, &c., &c., a part of the answer of said witness to interrogatory, made as follows:

"I got my information as to the location of the *of the* lower line of said reserve (meaning what he had before called the Austin & Wil-

liams' reserve line) from Col. F. W. Johnston, William Moore, deputy surveyor, and the citizens living in the vicinity of said line. Said William Moore informed me that he ran the upper line of the reserve on the east side of the Brazos River; that said line began on the east bank of the Brazos River, a short distance below the falls, running N. 71 E. My information was and is that the reserve line' were run by F. W. Johnston and William Moore in or about the years 1832 and 1833," and to the reading of which and all other parts of the said deposition wherein the said Horatio Chriesman undertakes to tell what Moore told him about the location of the Austin & Williams' reserve line, and *and* the Basquez grant, particularly wherein the said Horatio says in said deposition * * * * "he (meaning William Moore aforesaid) informed me (in 1834) that he had made the survey of the said 4-league Basquez grant; that the upper line of the said grant began on the east side of the Brazos River at the point where the upper line of the reserve began, and that the upper line ran N. 71° E. with the reserve line, the full distance of the Basquez line, and that the upper line of the Basquez and the upper line of the reserve were the same to the
99 extent of the Basquez line," the defendants then and there objected, and moved the court to exclude the same because there is no record proof that the upper line of "Austin & William reserve" was ever in fact run, or was ever required by law, order, or decree to be run; and 2nd, because there is no call made for the "Austin & Williams reserve" line in the grant of 4 leagues to Basquez; and because Chriesman, the witness, does not say that the said Moore ever pointed out to him the place on the ground that he had run either the reserve line or the Basquez line; because the testimony is hearsay, and not the character of hearsay that should have gone to the jury.

All of which objections of the defendants the court overruled, and permitted the said deposition of the said Chriesman to go to the jury; to which rulings of the court the defendants here in open court except, by their attorneys, and move the court allow their said exceptions, &c., &c., which is here now done.

Feb. 28, 1877.

[SEAL.]

W. B. WOODS,
U. S. Judge.

Def'ts' 4th bill of exceptions.—Filed March 1, 1877.—*M. Hopkins, cl'k.*

BAILIE PEYTON ET AL.
vs.
W. S. HUNNICUTT ET AL.

Be it remembered that on the trial of this cause the pl'tiffs offered in testimony the report of the surveyors appointed in the case of Huckins v. Poole, by the district court of Falls County, in 1870, as follows:

100 *Report of surveyors in case of Huckins & Poole.*

RHODO B. HUCKINS
vs.
J. C. POOL.

J. C. POOL
vs.
C. JONES.

Filed 16th Nov., 1869.

S. M. DALTON, *D. C.*

Surveyor's report.

THE STATE OF TEXAS,
County of Falls:

To the honorable the district court in & for the county of Falls:

In pursuance of an order made at the last or fall term of said court, (A. D. 1869,) directing the undersigned surveyors to proceed & run, or make any survey necessary, & show by report to what extent, if any, the land claimed by J. C. Pool, pl'tff, & C. Jones, def't, conflicts, & also the land claimed by Rhoda B. Huckins et als., pl'ff, conflict, if any, with *with* the land claimed by & in possession of J. C. Pool, def't; said land situated in Falls County, on the east margin of the Brazos River.

In accordance with said order we, the undersigned surveyors, met on the 11th day of November, A. D. 1869, at what is known as the Falls of the Brazos, on the east margin of said stream, & all the parties having been notified, & being present, either by themselves or attorneys, we ascertained by the calls of the A. De la Serda grant & the field-notes of the José M. Sanches survey, together with a full & complete examination of lines & natural marks, the precise locality of the southern line of the said La Serda grant, it being the northern line of the said Sanches survey, & for a more particular description reference is hereby made to our accompanying plat, which is made a part of this report.

We then proceeded to ascertain the boundaries of the Gregorio Basquez grant, & finding that the surveyor of Austin & Williams' colony located the same on what is known as Austin & Williams' reserve line; after searching we found marks, corresponding in age & course,
101 in post-oak timber, near the north end of what is known as Hog Island. After tracing said marks about fifteen miles, & finding the line to run N. 71 E., running from the Brazos River, & judging from the age of the marks & course of the line, together with the facts that after it passed the said Basquez N. E. corner it ran across, & without respect to all the known surveys of the section it passed, & there being no corners made on it, we were entirely satisfied that we were on said reserve-line.

We then ran the northern boundary of the Basquez to the east bank of the Brazos River, & found the following results:

That all the lands claimed by said J. C. Pool is included within the boundaries of the said Basquez & the said Sanches survey, as set forth in our accompanying plat of said survey, this the 16th of November, 1869.

S. W. BINGHAM.
R. F. ALEXANDER.
W. S. HUNNICUTT.
J. H. COLLARD.

THE STATE OF TEXAS,
County of Falls:

Personally appeared before the undersigned authority Sam. W. Bingham, R. F. Alexander, W. S. Hunnicutt, & J. H. Collard, whose names are signed to the foregoing report, who, after being duly sworn by me, on oath declare that said report is true & correct in the facts therein stated, & the conclusion arrived at is true & correct, according to their opinion as scientific surveyors.

To certify which I hereto sign my name & affix my seal of office on this 16th day of November, 1869.

SAMUEL M. DALTON, *D. C. F. C.*

102 Pl't'ffs also offered in evidence report of W. S. Hunnicutt, as dep'ty dist. surveyor, made in cause styled Angelina B. Eberly et al. vs. James Marlin et al., brought in this court in 1857, as follows, viz:

Report of W. S. Hunnicut.

To the clerk of the United States district court for the western district of Texas, at Austin:

ANGELINA B. EBERLY ET ALS.
vs.
JAMES MARTIN ET ALS.

SIR: In obedience to the commands of an order of survey issued from under your hand & seal, in your official capacity of the clerk of the district court of the United States for the western district of Texas, at Austin, commanding me to survey a certain tract of land containing four leagues, situated in this county, on the eastern margin of the Brazos River, below the Great Falls thereof, and to ascertain the lines thereof, which land is claimed by the pl'ff to the above-entitled cause, and which order of survey issued in said cause, and which land was titled to one Gregorio Basquez, I proceeded in last summer (the date not now being remembered) to search for said lines, and about one mile and a half below the Great Falls of the Brazos, w'ere on its eastern margin I found a line to start out from the river at a course of N. 68° E., in a weed-prairie, and at 9,170 varas from the river crossed Big Creek, at 20,220 varas from the river corners in prairie, strike prairie at about 12,500 varas. I then ran south 21° E., at right angles with said
103 line at 4,870. I found another old line running S. 60° W. to the river at 17,266 v's, making a difference in the length of the two lines of 2,960 varas.

I found the league and labor of land surveyed & located in the name of James Marlin to be entirely in conflict with the before-recited survey.

In testimony whereof I have hereunto set my hand this the 29th of Dec'r, 1857.

W. S. HUNNICUTT.

I, W. S. Hunnicutt, a dept. surveyor for Robertson's land-district, do hereby certify that the foregoing is a true and correct statement of facts to the best of my knowledge. Given under my hand and seal this 29th December, A. D. 1857.

W. S. HUNNICUTT,
Dept. Surveyor for Robertson's Land District.

To which def'ts object on the ground, among other reasons, that def'ts were not parties or privies to said cause.

But the court overruled said objections and permitted said report to go to the jury; to which def'ts except, and pray a bill of exceptions.

Feb. 28, A. D. 1877.

[SEAL.]

W. B. WOODS,
U. S. Judge.

104 *Def'ts' 5th bill of exceptions.—Filed March* 1, 1877.—*M. Hopkins, cl'k.*

Fifth bill of exceptions.

BAILIE PEYTON ET AL.
vs.
W. S. HUNNICUTT ET AL.

Be it remembered that on the trial of this cause the pl'ff's having offered in evidence a land-office copy of the Gregorio Basques title to eleven leagues of land, including the four leagues in controversy, as follows:

Translation of title for eleven leagues of land to Gregorio Basques.

Third stamp—two reales.

Legalized for the State of Coahuila and Texas, for the years 1828, '29, '30, '31, '32, & '33.

WILLIAMS.

To the alcalde of the town of Austin:

The citizen Jonathan C. Peyton, attorney of the citizen Gregorio Basques, before you in due and legal form, and with the necessary assurances, would represent: That my principal has obtained the right to eleven leagues of land in accordance with the 24th article of the colonization law of the State, of 24th March, 1825, which the supreme government has executed to him by sale on the 11th day of March, 1831, as will appear by the orginal documents issued by the secretary of state of the same supreme government, which is hereunto annexed, and it suiting my principal to divide them, in his name I pray you in justice be pleased to order that the title of possession be given to me in per-
105 son of eleven leagues of land on the Brazos River, within the colony of Mess'rs Austin and Williams, they giving their consent of said lands. I wish to take seven leagues upon the left margin, above and adjoining a survey of four leagues selected for Antonio Manchaca, and the four leagues to complete the number of the concession. I wish to take upon the same margin about 4 leagues below that of the first survey, which I have applied for. I also pray you to order that all necessary diligence be used that may be conducive to the interests of my principal. In the understanding that I offer to cultivate the same, agreeably to the provisions of the law, and to comply with the other obligations of the same.

Therefore I pray you be pleased to attend to this petition, in which I will receive favor and justice.

Town of Austin, September 21st, 1833.

J. C. PEYTON.

TOWN OF SAN FELIPE DE AUSTIN,
September 21st, 1833.

By being presented and admitted as prayed for, it will be transmitted to the empresarios, Mes's'rs Austin and Williams, for their opinion in the matter and their consent obtained.

Let this be transmitted to the principal scientific surveyor, citizen Francis W. Johnson, to execute the surveys of the eleven leagues of

land applied for by the attorney of Gregorio Basques, in order that in view of them, and the classification of the lands that he is bound
106 to make agreeably to law, together with the original documents to which it refers, the proper titles will be extended to him.

Thus I order and sign it.

LESASSIER.

TOWN OF SAN FELIPE DE AUSTIN,
September 23d, 1833.

Agreeably to the 9th article of the contract which we have ratified with the supreme government of the State of Coahuila and Texas, and the provisions in the additional article of instructions to commissioners, dated 25th April, 1830, we grant our approbation and consent that the possession be given to the attorney of Gregorio Basques of the eleven leagues of land that he solicits, as those for which he has applied are entirely vacant.

SAMUEL M. WILLIAMS,
For Himself and as Attorney for his Partner.

To the alcalde and commissioner:

The lands that I have surveyed in virtue of your foregoing decree for the attorney of Gregorio Basques, M'r Jonathan C. Peyton, are situated upon the Brazos River, above the San Antonio road, in the following form, to wit: Seven leagues on the left margin of said river, above and adjoining a survey of four leagues that I have surveyed for José Antonio Menchaca, and four leagues upon the same margin of the river, about 4 leagues below that of the first survey.

The limits, lines, and corners of the 1st-named survey of seven leagues are as follows:

107 Beginning at the upper corner of the aforesaid land of Antonio Manchaca, at a stake upon the margin of the river, from which, 3 v's, S. 9° E., there is a hackberry 12 inches in dia., and 1 $\frac{8}{10}$ v's to the N. 29° E. there is another hackberry 9 inches in dia.; from thence, N. 62° E. 21,029 v's, to a stake in the prairie for corner; from thence, N. 28° W. 8,750 v's, to another stake in the prairie; from thence, S. 62° W. 21,179 v's, to the margin of the river a stake, from which, 2 $\frac{8}{10}$ v's N. 43° W., there is a willow 8 inches in dia., and 2,$\frac{6}{10}$ v's; N. 8° W. there is another willow 10 inches in dia.; from this point, down the river, with the meanders of the same, to where closed at the beginning, and contains an arear of seven leagues of land, or, which is the same, 175,000,000 of square varas, bounded by the river; and on its lower side or S. E. with the land of the party adjoining Manchaca; and on its other sides by vacant land; and to the best of my knowledge is composed of 31,250,000 of square varas, or, which is equal, one and one-fourth of a league of land, and 143,750,000 of square varas, or, which is equal, 5$\frac{3}{4}$ leagues of pasture-land, and its figure is that shown in the plan which accompanies this.

The second survey of four leagues has the situation, limits, lines, and corners as follows, to wit:

108 Situated upon the left margin of the Brazos River and beginning at a stake upon said margin marked "P"; from thence, N. 71° E., and at 10,200 v's, crossed what is called Isaach's Creek, and at 20,220 v's set a stake for the 2nd corner; from thence, S. 19° E. 5,000 v's, and to where set another stake for the 3d corner; from thence, S. 71° W. 18,320 v's, again crossing the aforesaid creek to the river Brazos where set another stake for the 4th corner; from this point, up the river,

with the meanders of the same, to the place of beginning, and contains an area of 4 leagues of land, or, which is the same, 100,000,000 of square varas, bounded by the river, and on its other sides by vacant lands; and to the best of my knowledge is composed of 18,750,000 square varas, or, which is the same, ¾ of a league of arable and 81,250,000 of square varas, or, which is the same, 3¼ leagues of pasture-land, and its figure is that shown in the accompanying map.

F. W. JOHNSON.

Third stamp—two reales. [STAMP.] For the years 1830 & 1831.

MOST EXCELLENT SIR: Gregorio Basques, a native of the city of Mexico, and now residing in this town, with the due respect to your
109 excellency, I would represent that, understanding the provisions of the 24th article of the colonization law of the State, of the 24th March, 1825, and in virtue of being a native Mexican, with due respect to your excellency, I pray you be pleased to grant me in sale eleven leagues of land on the vacant territory of this department, with the privilege of selecting them together, or seperate, or in distinct places, as may suit me, with the understanding that I offer to settle and cultivate them as customary; that it may be to the purpose, within the term which the law prescribes, making the payments of its value on the terms and at the places designated in the 22nd article, and to sustain the right of country and of the State and all other that may be in conformity with the laws which govern us; and under their protection I pray your excellency be pleased to do as aforesaid, in which I will receive favor.

Nacogdoches, September 28th, 1830.

GREGORIO BASQUES.

LEONA VICARIO, *March 11th*, 1831.

In conformity with the 24th article of the colonization-law of 24th March, 1825, I grant by sale to the petitioners the eleven leagues of land that he solicits on the vacant territory of the State, at the place that may best suit him, after the commissioner of the supreme general government shall have set apart a sufficiency of land for the payment of the debt due by the State to the federation.

110 The commissioner for the partition of land in the enterprise to which pertain the land solicited by the petitioner, and in his default, or that the same not being embraced by any enterprise whatever, the 1st or sole alcalde of the respective jurisdiction, will comply with the orders on the subject, and put him in possession of said leagues, and issue the proper title, previously classifying the quality of them, for according to their designation he shall satisfy the State, for the payment of which I concede him the terms designated in the 22nd article of the aforesaid law. Let a copy of his petition and this decree be given by the secretary of state to the interested party, so that upon application with it to the commissioner it may have the desired effect.

LETONA.

SANTIAGO DEL VALLE, *Secretary.*

A copy of the original on file in the archives of the office of the secretary of state in my charge, from whence it was taken by orders of his excellency the governor Leona Vicario. March 14th, 1831.

SANTIAGO DEL VALLE.

Third stamp—two reales.

Legalized for the State of Coahuila & Texas for the years 1828, '29, '30, '31, '32, & '33.

WILLIAMS.

In the town of San Felipe de Austin, on the 7th day of October, 1833, I, the citizen Luke Lesasseir, constitutional alcalde of this town
111 and its jurisdiction, in the exercise of the authority which has been conferred on me by the supreme government of this State, by decree dated at Leona Vicario on the 11th March, 1831, and in consideration of the sale executed by the aforesaid supreme government in favor of Gregorio Basques, a native of the city of Mexico, then residing in the town of Nacogdoches, of eleven leagues of land, as will appear from the superio decree of sale dated in the aforesaid Leona Vicario, on the 11th day of March, 1831, and presented by his attorney, Jonathan C. Peyton, as will be seen on pages 3 and following of this proceeding, and in attention to the superior order of his excellency the lieutenant-governor, dated on the 29 day of January of this year, and circulated by the chief of this department on the 19th of last February, repealing the provisional decree of the supreme government of the State in relation to those citizens to whom had been granted land not being permitted to take possession of them until the commissioner-general of the nation shall have made a reservation; and inasmuch as none of those eleven leagues applied for by the interested party are at any of those points ceded to the federation by the aforesaid order, and in view of the approval granted by the empresarios, Mess'rs Austin and Williams, written upon the 1st page of this proceeding, as the lands belongs
112 to the enterprize of said empresarios, in conformity with the colonization-law of the State of 24th March, 1825, and in the name of the State, I confer upon, and put the aforesaid attorney of the citizen Gregorio Basques, in real, virtual, personal, and actual possession of eleven leagues of land, the same which he has asked for and that the government has sold to him upon the Brazos River; the situation lines, limits, and corners of the same are delineated in the notes of survey made by the principal scientific surveyor, Francis W. Johnson, on pages two and following of this proceeding, with the figure thereof shown in the map, hereunto annexed.

The aforesaid land, by said notes of survey are, in the opinion of the surveyor, to be of the arable class in two leagues, and of the pasture-class in nine leagues. I, the commissioner and alcalde aforesaid, in the exercise of the authority conferred on me by the law, do declare, in accordance with said classification, he shall satisfy the State in the sum of one thousand two hundred dollars, according to the provision in the 24th article of the foresaid colonization-law, dated on the 24th March, 1825, and on the terms designated in the 22nd article of the same law, under the penalties therein established, being notified that within one year he shall construct permanent land-marks at each angle of the lands, that he shall cultivate the same in conformity with the provisions
113 in the aforesaid law, and scrupulously comply with all ordained in it, and other enactments on the subject.

Therefore, by virtue of the authority vested in me by the aforesaid decree of the supreme government of the State, and other orders from the same government on the subject by the law, and pursuant instructions which guide me, I issue the present title, and order that an authenticated copy be taken of it, and let it be delivered to the interested party,

that he may possess, use, and enjoy the lands which has been sold to him, his children, heirs, and successors, or whoever of him or of them may have cause, interest, or right to represent, for such is the will of the State.

Given at the town of San Felipe de Austin on the day and date above written, which I sign, with assisting witnesses, according to law.

L. LESASSIER.

Ass. witness:
W. T. LIGHTFOOT.
Ass. witness:
C. C. GIVENS.

Second stamp—twelve reales.

Legalized for the State of Coahuila and Texas for the years 1828, '29, '30, & '31.

By commission:

JESUS DE LOS SANTOS COY.

In the town of Nacogdoches, on the 20th day of September, 1831, before me, the citizen Manuel de los Santos Coy, sole constitutional alcalde of the aforesaid town, and instrumental witnesses hereinafter
114 named, besides those of my assistants, with whom I act agreeably to the law, appears the citizen Gregorio Basques, of this jurisdiction, in his proper person, whom I declare to know, and who says that by these presents he executes, gives, and confesses all his power, full, ample, and sufficient, whatever may be required by law and is necessary or may be of value, to Don Jayne Harts, of this jurisdiction special, that he may, in representation and use of the rights and interests which pertain to the grantor, he will solicit of the person or persons authorized to that effect the possession and titles of eleven leagues of land which he has obtained from the supreme government of the State by way of purchase, with the authority to empower him to solicit in the place or places which best suits him, together or separate, according to the tenor of the concession of the date of 11th March of this year, which I declare to have seen, and the grantor has placed in the hands of his attorney, that he may do and perform in the name of the grantor all whatsoever he might do were he actually present, since for all as aforesaid be annexed concerning, incident, and pertaining, he gives and confers the most ample and extensive power, without any limitation whatever, and without which, by default of any clause or requi-
115 site, he gives to this power all the force and effect, whatever the same may be, as if the same was herein literally written and inserted; that he may appoint substitutes, revoke the same, and appoint others anew, with free, frank, and general administration in form, since for all he relinquishes by this act whatever permits and acknowledges all whatsoever his attorney may do or perform by virtue of this power of attorney, binding his person and property in every form, and renounces all laws in this favor.

In testimony whereof thus he executes. As he does not know how to write, he makes the sign of the cross. There were present as instrumental witnesses the citizens Martin Ybavo, Antonio Manchaca, and Carlos Gil, residents of this town, and those of my assistants, in the form prescribed by law, to which I certify.

MANUEL DE LOS SANTOS COY.

Sign of the cross of GREGORIO BASQUES, X.

Ass. witness: JESUS DE LOS SANTOS COY.
Ass witness: VITAL FLORES.

REC. 809—4

This testimonio agrees with the original, which remains in the archive of the public documents of this municipality, which goes truly and legally compared and corrected, and at its transcribing, correction, and comparing the same there was found the same instrumental witnesses who were present at its execution, besides those of my assistants with whom I act in the form prescribed by law, to which I certify.

116 MANUEL DE LOS SANTOS COY.

Ass. witness: JESUS DE LOS SANTOS COY.
Ass. witness: VITAL FLORES.

In the town of San Felipe de Austin, on the 2nd day of March, 1832, before me, the citizen Horatio Chrisman, 1st alcalde of this municipality, and witnesses, Jayne Harts, a resident of Nacogdoches, exercising the authority conferred on him by the preceding power of attorney, consents to substitute it, in all and for all, on Jonathan C. Peyton, of this jurisdiction, to whom he relinquishes, and accordingly does relinquishes, binding the property bounden in said power of attorney, and agreeing to the substitution in form, and signs it, whom I declare to know, there being no witness fees. Don Amos Gates and Samuel Gates, residents of this colony.

HORATIO CHRISMAN.
HYMAN HERTZ.

Ass. witness: FRANCIS ADAMS.
Ass. witness: OLIVER JONES.

GENERAL LAND OFFICE,
Austin, March 15th, 1860.

I, Edward Linn, Spanish clerk in said office, bonded and sworn, certify that the foregoing is a correct translation of the original title to Gregorio Basques, on file in said office, interlined, 3d page, 14th line, "in."

EDWARD LINN.
Spanish Clerk.

117 GENERAL LAND OFFICE,
State of Texas:

I, Francis M. White, commissioner of the general land-office of said State, certify that Edward Linn is Spanish clerk in said office, bonded and sworn, and that his acts as such are entitled to full credit.

In testimony whereof I have hereto set my hand and caused the seal of said office to be affixed, at the city of Austin, this 15th day of March, A. D. 1860.

[SEAL.] FRANCIS M. WHITE.

And proved title in themselves by inheritance from Jonathan C. Peyton, and the def'ts, Watson, Bartlett, and Jones, having offered in evidence land-office copy of the John Marlin title to his head-right league of land, as follows:

John Marlin, title to head-right league.

Stamp, third denomination—two rials. Treasury of the free State of Coahuila and Texas. Seal.

For the biennial term of 1832 and 1833, '34 and '35.

(Signed) FLORES.

Citizen William H. Steele, commissioner, appointed by the executive of this State to distribute and give possession of lands and issue pat-

ents thereto to colonists under the colonization contract of the Nashville Company.

Whereas John Marlin has been received as a colonist in the colony established under the colonization contract made by Robert
118 Leftwick with the government of the State of Coahuila and Texas on the 15th day of April, one thousand eight hundred and twenty-five, and afterwards granted to the Nas'ville Company on the 15th day of October, one thousand eight hundred and twenty-seven; and whereas the said John Marlin has established that he is a married man, and that he embodies in his person the qualifications prescribed by the State colonization law of the twenty-fourth of March, one thousand eight hundred and twenty-five, in conformity to said law and the provisions of said contract, which authorizes the settlement of families within the limits of said colony upon the unoccupied lands of said company contract, and under the instructions by which I am governed, bearing date the fourth of September, one thousand eight hundred and twenty-seven, and the additional article bearing date the twenty-fifth day of April, one thousand eight hundred and thirty, and in the name of the State, I grant, confer, and put the aforementioned John Marlin in full and corporal possession of one sitio (league) of land, which land has been surveyed by Andrew Montgomery, the surveyor previously appointed for that purpose, under the location and boundaries following:

Beginning at the northeast corner of labor number one, on
119 Thomas Jefferson Chambers' lower line; thence north forty-five degrees east six thousand one hundred and eighty varas with Chambers' line to a stake from where an oak eight inches in diameter bears south sixty degrees east at eight varas and another oak twelve inches in diameter bears south twenty-three degrees west at twenty-two varas, having at two thousand two hundred varas entered timber, at two thousand four hundred and ninety varas entered prairie, at two thousand eight hundred and thirty varas entered high land, at five thousand five hundred and twenty varas; thence south thirty degrees east five thousand four hundred and seventy varas to a stake from where a live-oak four inches in diameter bears north fifty-five degrees west at six varas and an elm twelve inches in diameter bears south ten degrees east at five varas, having entered chaparral prairie at six hundred and fifty varas, entered grassy prairie at two thousand one hundred and eighty varas, entered timber at two thousand five hundred and ten varas, entered grassy prairie at two thousand seven hundred and ten varas, entered timber at three thousand three hundred varas, crossing a creek called in English "Musselrun," at four thousand seven hundred and eighty varas, crossed a creek a' five thousand one
120 hundred and ninety varas; thence south sixty degrees west five thousand varas to the southeast corner of labor number nine, and crossing said "Musselrun" Creek; thence north thirty degrees west three thousand varas with the back lines of labores number nine, eight, and seven to the northeast corner of labor number seven; thence south sixty degrees west one thousand varas to the northwest corner of said labor on the back line of labor number two; thence north thirty degrees west nine hundred and thirty varas to the place of beginning with the back line of labors numbers two and one, and comprising an area of one sitio (league) of land.

Four twenty-fifth parts of the aforesaid land are classified as unirrigable farming, according to which classification the amount he shall pay to the State will be assessed in accordance with the provisions of article

twenty-two of the aforesaid law and under the penalties therein prescribed. He is notified that he will be required to construct permanent corners at each one of the corners of said land within one year; that he will settle upon and cultivate the land in conformity to the requirements *to* the law.

Stamp, third denomination—Two rials. Treasury of the free State of Coahuila and Texas. Seal.

For the biennial term of 1832 and 1833, 34 and 35.

(Signed)

FLORES.

Therefore, in the exercise of the powers in me vested by the
121 law in such cases made & provided, and under instructions issued pursuant thereto, I issue this patent, and direct that a testimonio (certified copy) thereof be made and delivered to the party interested, to have and to hold the land, himself, his heirs, and assigns, or any one claiming the same by, under, or through him or them.

Palo blanco, void; encino, valid.

Given at the city of Viesca on the second day of February, one thousand eight hundred and thirty-five.

(Signed) GUILLERMO H. STEELE.
Attest: (Signed) MANUEL VALDEZ FLORES.
Attest: (Signed) J. G. W. PIERSON.

STATE OF TEXAS, GENERAL LAND OFFICE,
TRANSLATOR'S DEPARTMENT,
Austin, October 28th, 1874.

I certify the foregoing to be a correct translation from the original Spanish of what purports to be a grant to John Marlin, as contained on file 14, pages 185, 186, & 187, of the permanent records of this office.

DAVID V. WHITING,
Spanish Translator.

STATE OF TEXAS, GENERAL LAND OFFICE,
Austin, October 28th, 1874.

I, J. J. Groos, commissioner of the general land-office of the State of Texas, do hereby certify that David V. Whiting, whose genuine signature is attached to the foregoing certificate of what purports to
122 be a grant to John Marlin, is the Spanish translator of this office, duly qualified according to law, and that his official acts as such translator are entitled to full faith and credit.

In testimony whereof I hereto set my hand and cause the impress of the seal of the general land-office to be stamped on the day and date last above written.

J. J. GROOS,
Commissioner.

And having offered also the land-office copy of the José M. Sanches' title to a concession of five leagues, as follows, viz:

José M. Sanches' title 5 leagues.

Stamp, third denomination—Two rials.

Validated by the State of Coahuila and Texas for the biennial term of 1828 & '29.

(Signed) WILLIAMS.

At the city of San Felipe de Austin, on the twelfth day of February, in the year one thousand eight hundred and thirty-one, personally came before me, citizen Francis W. Johnson, mayor of the city aforesaid, citizen José Maria Sanchez, a native and resident of Nacogdoches, whom I certify to be known to me, and stated that whereas the executive of the State has granted him permission to purchase five leagues of land from the public domain of the State where he may select, as per permit bearing date the twentieth day of December of the year last past, and attached to the protocol which he has exhibited, he hereby
123 confers his special power, to the extent required by law, upon citizen Samuel M. Williams, that in his name and representing his rights, title, and interest, he may and shall actually apply to the respective commissioner appointed by the executive aforesaid for the possession of the aforesaid five leagues, where ever it may appear to his attorney to be to the interest of his principal to locate them, and to apply for and demand the legal possession of the aforesaid leagues, until he shall be fully in possession of them, with all the formalities and solemnities prescribed by law, and for that purpose his grantor delivers to him the permit issued from the office of the executive of the State, and that he grants him also full power and authority to act in the premises, as well as if the grantor were personally present, until he shall recover the respective patent or patents thereto.

The grantor aforesaid, the said Sanchez, further states that he confers full power and authority upon his attorney, the said Williams, to convey, sign, and execute title to Luke Lesassier and William H. Jack, residents of this city, for the five leagues of land aforesaid sold to them by his attorney, with the formalities prescribed, and to execute and sign the same and for the same purpose as if he, the grantor, were personally present, and he declares this to be his intintion by virtue of the
124 rights vested in him under the colonization law of this State as set forth in article twenty-seven thereof, and to only require of the aforesaid Lesassier and Jack the faithful compliance with the obligations imposed by law upon his grantor, on which conditions the sale is made and title to be executed.

On which terms, and that it may appear upon record whenever and wherever the grantor may so desire, in testimony thereof he hereto set his hand with me before my subscribing witnesses, with whom I officiate in the absence of a notary public, there being none in this city, within the terms prescribed by law, through citizen Don Juan Austin, a resident of this city, whom he requested to sign for him, as he stated that he could not write, and the said Don Juan Austin did so sign; citizens Isaac M. Pennington and J. R. Bedford being documentary witnesses thereto.

I sign for the grantor at his request.

(Signed) JOHN AUSTIN.
(Signed) F. W. JOHNSON.

Attest: (Signed) FR' ADAMS.
Attest: (Signed) JOSEPH SMITH.

Documentary witnesses:
(Signed) I. M. PENNINGTON.
JOS. R. BEDFORD.

Stamp 3d denomination—4 rials.

Validated by the State of Coahuila and Texas, for the years 1832 and 1833.

(Signed) LESASSIER.

The party interested has paid into this receiver's office under
125 my charge 4 rials, the price of the foregoing stamp.
City of Austin, October 24, 1833.
(Signed) SAMUEL M. WILLIAMS.

To the mayor of the city of Austin:

Citizen Samuel M. Williams, attorney for citizen José Maria Sanches, a native of Nacogdoches, without prejudice to his legal rights, and under all the necessary and required protests, represents to you that, under the provisions of article 24 of the State colonization law of the 24th March, 1825, his principal acquires the right to five leagues of land, which the executive of the State granted him permission to purchase on the 20th day of December, 1830, as the original document issued from the office of the secretary of state herewith accompanying will accredit.

As it will be more acceptable to his principal to divide them, he prays you in his name, justice intervening, to be pleased to direct that patent issue to him for five leagues of land as herein described, viz: One and one-quarter league on the left bank of the Brazos, between the lands surveyed for Gregorio Basques and Atanacio de la Serda, and one and one-quarter leagues on the opposite bank in front of the first-mentioned location, and two and one-half leagues located on a creek called Davidson's or Nuncio Creek, west of the Brazos, about three leagues above the Bejar or upper road, which lands lie within Mess'rs Austin &
126 Williams' colony, on condition that they approve of the location of said lands within their colony, and requesting you to be pleased to direct that such proceedings be had in the premises as may be conducive to the interests of his principal, binding himself to cultivate them in accordance with the provisions of the law on the subject, and to comply with the other requirements thereof.

He therefore prays you to grant his petition, wherein he will receive grace.

Altered 20 de Dic'l. Cultivarlos, valid.
City of Austin, October 7th, 1833.
(Signed) SAMUEL M. WILLIAMS.

Marginal note.

SAN FELIPE DE AUSTIN,
October 7th, 1833.

Presented and granted as prayed for.

This application is referred to Austin & Williams, the contractors, who will report their opinion thereon, and having received their approval it will be transmitted to citizen Francis W. Johnson, the duly-qualified surveyor-general, for the survey of the five leagues of land located by the attorney for José Maria Sanches, that, in view thereof and the classification which he shall make, the respective patent shall issue thereto, to which the original document he refers to will be attached.

I hereby so direct and hereto set my hand.
Altered, ella. Thabido, valid. Cinco, valid.
(Signed) LESASSIER.

CITY OF SAN FELIPE DE AUSTIN,
October 8th, 1833.

127 In the exercise of the powers vested in us by law, and the provisions of article 9 of the contract entered into between us and

the executive of the State, the location made by the attorney for Don José Maria Sanches, of five leagues of land, as set forth in the foregoing application, being unappropriated otherwise, is hereby approved.

(Signed) SAMUEL M. WILLIAMS,
For himself and as Attorney for his Partner.

To the mayor and commissioner:

The lands which I have surveyed to citizen Samuel M. Williams, attorney for citizen José Maria Sanches, are located as follows:

One and one-quarter league on the left bank of Brazos River, between the lands surveyed for Gregorio Basques and Antonio de la Serda, and one and one-quarter league on the opposite bank, at the point called, in English, the Falls, the lower part of which survey lies opposite to the upper part of the former, and two and one-half leagues on a creek called Davidson's Creek, and by some Mencio Creek, between Brazos and Red River, about three leagues above the Bexar road. The metes, bounds, and corners of the first-mentioned tract are as follows, viz:

Beginning the survey at the upper corner of Atanacio de la Serda tract, a state on the left bank of the river, from which a hackberry 10 inches in diameter bears south 49° west at 15 varas, and 21 varas
128 south 84½ west (the description of bearing tree left out in the original translator); thence north 62° east nine thousand two hundred and eighty varas, to a stake for the second corner; thence south 19° east four thousand one hundred varas, to another stake; thence south 71 degrees west ten thousand two hundred varas, to the bank of the river, and set a stake for the lower corner; thence up the river to the place of beginning, and covering a superficial area of 31,250,000 square varas, or their equivalent, one and one-quarter leagues, bounded by the river, and on the upper side by land of Atanacio de la Serda, and on the lower side by land of Gregorio Basques. It contains, to the best of my knowledge and belief, eight labor's of unirrigable farming-land, and twenty-three and a quarter labores of grazing-land, the outlines of which are set forth on the plat herewith accompanying.

The metes, bounds, and corners of the second tract are as follows, viz:

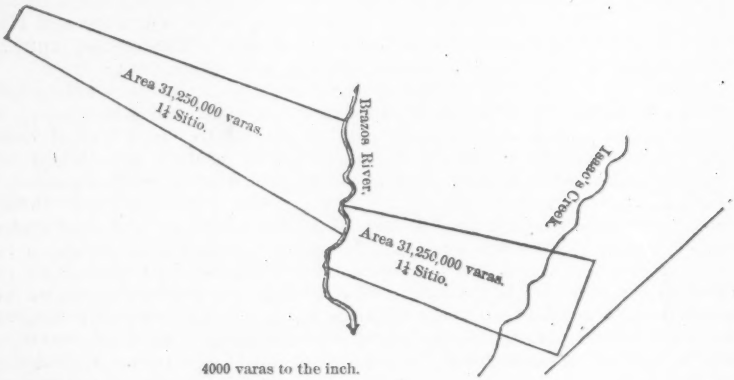
Beginning the survey at a stake in a small prairie lying on the right bank of the river, from which an elm 14 inches in diameter bears north 65½° east at 69 varas, and another elm, 6 inches in diameter, bears north 72° east at 73 varas; thence south 62 degrees west to a point from which another line, running south 28 degrees east, will intersect the upper line of the land reserved for Mess'rs Austin & Williams,
129 the contractors, and following said line north 71 degrees east to the river, at the upper corner of said land; thence up the river, to the place of beginning, will embrace a superficial area of 31,250,000 square varas, or their equivalent, one and one-quarter of a league, bounded by the river, and on the upper side by the aforesaid contractors' land, and on the remaining sides by public domain. It contains, to the best of my knowledge and belief, seven labor's of unirrigable farming-land, and twenty-four and one-fourth labor's of grazing-land, with the outlines set forth on the plat herewith accompanied.

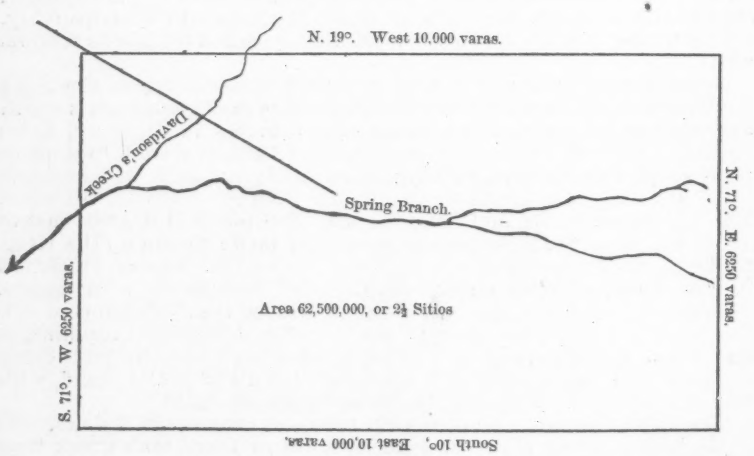
The metes, bounds, and corners of the third tract are as follows, viz:

Beginning the survey at a stake set north of Davidson's Creek from which a pin-oak 20 inches in diameter bears south 20 degrees west at 2 varas, and an elm 20 inches in diameter bears north 47 degrees east at 4 varas; thence south 71 degrees west at 90 varas, crossed the creek

aforesaid, and at 3,125 varas set a stake in the prairie for a corner; thence north 19 degrees west ten thousand varas, and set another stake for a corner; thence north 71 degrees east six thousand two hundred and fifty varas, and set another stake for a corner; thence south 19 degrees east ten thousand varas, and set another stake for a corner; thence
130 south 71 degrees west three thousand one hundred and twenty-five varas to the place of beginning, and covering a superficial area of 62,500,000 square varas or their equivalent, two and one-half leagues, bounded on all sides by public domain. It contains, to the best of my knowledge and belief, eight labores of unirrigable farming-land, and forty-four and one-half labores of grazing-land, with the outlines set forth on the plat herewith accompanied.

(Signed) F. W. JOHNSON.




N. 19°. West 10,000 varas.
Johnson's Creek
Spring Branch.
N. 71°. E. 6250 varas.
Area 62,500,000, or 2½ Sitios
S. 71°. W. 6250 varas.
South 10°. East 10,000 varas.

131 Stamp third denomination, two rials.

Treasury of the free state of Cohuila and Texas (seal) for the bien'ial term of 1830 & 1831.

To his excellency:

José Maria Sanchez, native and resident of Nacogdoches, within the jurisdiction of this state of Coahuila and Texas, respectfully represents to your excellency that, requiring land for agriculture and stock-raising purposes, and at the same time interested in the welfare and prosperity of said State, he prays your excellency to be pleased to authorize him to purchase five leagues of land from the public domain of said department to be located in one body or in seperate tracts, or in such manner as may be most conducive to his interests, binding himself, as hereby does, to settle upon and cultivate them in the manner and form prescribed by law, and he further prays your excellency to allow him to make the payments for said land on the terms authorized by the aforesaid law. He therefore prays and requests your excellency to grant his request, wherein he will receive grace, and, not knowing how to write, he requests citizen Pedro Zarza to sign his name for him.

For the petitioner,

PEDRO ZARZA.

LEONA VICARIO,
December 20th, 1830.

132 In accordance with the provisions of article 24 of the colonization law of the 24th March, 1825, I hereby authorize the applicant to purchase the five leagues of land that he applies for from the public domain of the State, at such point as he may designate, after the commissioner from the general government shall have selected a sufficient quantity to pay the indebtedness of the state to the federation.

The mayor of the municipality to which said land shall belong will put him in possession of the aforementioned leagues, and will issue the respective patent thereto, after having classified their quality so as to determine the amount of his indebtedness to the State; for the payment the terms designated in article 22 of the law aforesaid are hereby allowed.

The petitioner will be furnished from the secretary's office with a copy of his application and of this order; that upon application with them to the commissioner the ends proposed may be accomplished.

VIESCA

SANTIAGO DEL VALLE, *Secretary.*

A copy from the original on file in the archives of this office, under my charge, from which it was ordered to be made by direction of his excellency the governor.

Leona Vicario, December 23rd, 1830.

(Signed) SANTIAGO DEL VALLE,
Secretary.

133 Stamp 3rd denomination, 4 rials, validated by the state of Coahuila and Texas for the years 1832 & 1833.

(Signed) L. LESASSIER.

The party interested has paid into this receiver's office, under my charge, 4 rials, the price of the foregoing stamp.

(Signed) SAMUEL M. WILLIAMS.

At the city of San Felipe de Austin, on the nineteenth day of the month of October, in the year one thousand eight hundred and thirty-three, I, citizen Luke Lesassier, the duly constituted mayor of this city and its municipality, in the exercise of the powers vested in me by the executive of this state, as contained in the order dated at Leona Vicario on the 20th day of December, 1830, and by virtue of a sale authorized to be made by the executive aforesaid in favor of citizen José Maria Sanches, a native and resident of Nacogdoches, for five leagues of land, as appears upon the executive permit, dated at the city of Leona Vicario, on the aforesaid twentieth day of December, 1830, presented by his attorney, citizen Samuel M. Williams, and contained on pages three and four of this protocol, and in view of the order issued by his excellency the lieutenant-governor, bearing date the 29th day of January of the current year, promulgated by the head of civil affairs of this department on the 19th day of February last past, declaring the orders given by the executive of the state to the effect that those citizens to
134 whom grants of lands had been made should not take possession of them until the commissioner from the general government should have made his selections, to be null and void, and as the five leagues located by the party interested are not included in any of the reservations granted to the federation under the aforementioned order, and in consideration of the approval had from Austin and Williams, the contractors, contained on the reverse of the first page of this protocol, the lands being included in the said contractors' colony, in conformity to the provisions of the State colonization law of the twenty-fourth of March, one thousand eight hundred and twenty-five, and in the name of the State, I confer upon and put the aforesaid attorney for José Maria Sanchez in the full and corporeal possession of five leagues of land, the same that he applied for and that were sold to him by the government, on Brazos River and Davidson's Creek, the location, metes, boundaries, and corners of which are more fully described in the field-notes returned by citizen Francis W. Johnson, the duly qualified surveyor-general, as set forth on page two and its reserve of this protocol with the outlines set forth on the plot thereto attached.

The aforesaid lands, in the opinion of the surveyor, as stated in the field-notes returned by him, contained twenty-three labores of
135 unirrigable farming and one hundred and two labores of grazing land.

I, the mayor and commissioner aforesaid, in the exercise of the powers conferred upon me, so designate and classify them, according to which classification he will pay to the State the sum of five hundred and forty-six dollars, as provided in article twenty-four of the aforesaid colonization law of the twenty-fourth of March, one thousand eight hundred and twenty-five, on the terms designated in article twenty-two of the same law, and under the penalties therein prescribed.

He is notified that he will be requested to construct permanent corners at each one of the corners of the several tracts within one year, that he will cultivate them in conformity to the provisions of the aforesaid law, and that he will faithfully comply with all the requirements of that and other laws in the premises.

Therefore, in the exercise of the powers conferred upon me by the aforesaid executive order and other provisions, emanating from the same executive in the premises, by the laws and instructions issued pursuant thereto by which I am governed, I issue this patent and direct that a certified copy (testimonia) thereof be made and delivered to the party interested, to have and to hold the land so sold to him, his children,

heirs, and assigns, or any one claiming or to claim the same by,
136 under, or through him or them, such being the pleasure of the State.

Given at the aforesaid city of San Felipe de Austin, date ut supra, to which I set my hand with subscribing witnesses, according to law.

(Signed) L. LESASSIER.

Attest: (Signed) C. C. GIVENS.

Attest: (Signed) S. H. JACK.

GENERAL LAND OFFICE,
TRANSLATOR'S DEPARTMENT,
Austin, February 10, 1876.

The foregoing and above is a correct translation from the original Spanish of what purports to be a sale to José Maria Sanchez, as contained on pages 143 to 150, of volume 29, of the permanent records of this office.

[L. S.] DAVID V. WHITING,
Spanish Translator.

STATE OF TEXAS, GENERAL LAND OFFICE,
Austin, February 10, 1876.

I, J. J. Groos, commissioner of the general land office of the State of Texas, do hereby certify that David V. Whiting, whose signature is subscribed to the foregoing certificate, is the Spanish translator of this office, duly qualified according to law, and that his acts as such translator are entitled to full faith and credit.

In testimony whereof, I hereto set my hand and cause the impress of the seal of the general land-office to be stamped, on the day and date last above stated.

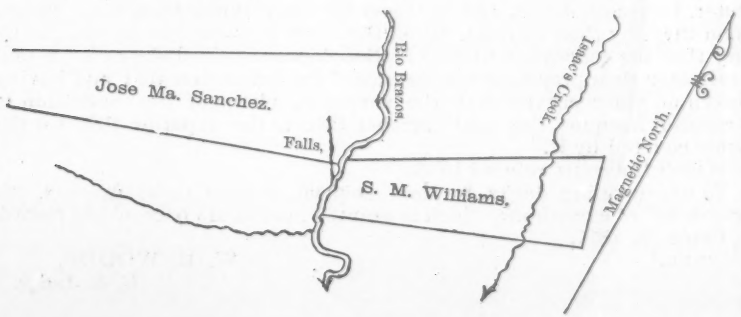
[L. S.] J. J. GROOS,
Commissioner.

137 And in connection with said Sanches' title, a land-office copy of original field-notes of said Sanches, as made by Deputy-Surveyor W'm Moore, as follows, viz:

In Austin and William colony.

Have surveyed the following two and a half leagues of land, one and a quarter on each side.

January 12th, 1833.



L. office copy of orig'l field-notes of Sanchez title.

Beginning, for the league and a quarter on the east side of the Brazos' at a stake near falls, which is R. M. Williamson's S. W. corner, and which bears S. 47 W. 15 2 varas from a hackberry 10 in. diam., and S. 48½ W. 21 varas from a hackberry 15 in. diam.; thence down the river with its different meanders 2,500 varas on a right line to a stake on E. bank, &c.; thence N. 71 E. 10,200 varas to stake, and crosses Isaac's Creek; thence N. 19 W. 4,100 varas to stake; thence S. 62 W. 9,280 varas to the place of beginning, and crosses Isaac's Creek.

138 For the league and a quarter on the west side, beginning at the point where the upper line of the reserve will cross the Brazos; thence up the Brazos, with its different meanders, to a stake in small prairie on river, bearing N. 65½ E. 69 varas from an elm 14 in. diam., and N. 72 E. 73 2 varas from an elm 6 in. diam.; then to run S. 62 W. to a point from which a line running S. 28 E. to the upper line of the reserve will, with the upper line of the reserve and the aforementioned boundary's, inclose a league and a quarter land, one-fo'rth farming, remainder pasture. Growth, oak, elm, ash, hackberry, &c.

WILLIAM MOORE,
D. Surveyor.

JOHN MCRAE.
THORNTON KUYKENDALL,
FELIX WRIGHT,
S. C. C. & M.

GENERAL LAND-OFFICE,
Austin, Texas, November 16, 1869.

I, Joseph Spence, commissioner of the general land-office of the State of Texas, do hereby certify that the foregoing copies of the *of the* plot and field-notes of two surveys, of one league and a quarter each, one on the east bank and the other on the west bank of the Brazos, are true and correct copies from the originals now on file in this office.

In testimony whereof I hereto set my hand and affix the seal of said office the day and date last above written.

[L. S.] JOSEPH SPENCE.

139 Also, original receipt for empresario's charges on the said land, as follows, viz:

(The clerk of the court states that this receipt was on a small slip of paper scarcely two inches wide, and has not been seen since the return of the papers by the jury, nor with the most careful search has he been able to find it.)

And having shown title under said grants by purchase, to their ancestor, Churchill Jones, and to them by inheritance from him, whereupon they, by their counsel, asked the court in substance to charge the jury that the concession to Jose M. Sanches authorized the ow'er of said concession to appropriate five leagues of the public domain; and having shown an older survey than the survey by virtue of the concession to Gregorio Basques, the said Sanchez title is the superior title for the lands covered by it.

Which the court refused to do.

To which ruling def'ts, by their counsel, in open court excepts, and pray a bill of exceptions, which is granted and made part of the record.

Feb'y 28, 1877.

[SEAL.] W. B. WOODS,
U. S. Judge.

140 *Defendants' 6th bill of exceptions.—Filed March 1st, 1877.—M. Hopkins, cl'k.*

BAILIE PEYTON ET AL.
v.
W. S. HUNNICUTT ET AL. } 1552.

Be it remembered that on the trial of this cause the def'ts, A. E. Watson and his children, Z. Bartlett & his wife, and W. H. Jones, after having shown title in themselves to the several tracts of land claimed by them in their pleadings, by regular transfer from the sovereignty of the soil, introduced evidence under their plea of limitation tending to show that in 1855 or 1856 their ancestor, Churchill Jones, took actual possession on that part of the John Marlin league, which conflicts with the Basquez four-league grant, as claimed by pl't'ffs, and built a mill thereon and other improvements, which possession has continued exclusively in def'ts, and those under whom they hold; and that after the entry by def'ts' ancestor, viz, in April, 1858, the ancestor of pl't'ffs entered on the said Basquez grant (but not on the conflict with the land covered by def'ts' titles), and made a lease to one James Marlin, permitting him to occupy a tract of 320 acres, on which the said James Marlin then resided, and has so continued to hold as the tenant of pl't'ffs & their ancestor; whereupon said def'ts, by their counsel, before the jury retired from the bar, prayed the court to charge the jury in substance, that if they believed from the testimony that the ancestor of def'ts, Churchill Jones, entered upon that part of the John Marlin league which is in conflict with the Basquez, as claimed by pl't'ffs, at any time before the pl't'ffs or their ancestor made an entry on said Basquez,
141 and that said def'ts and their ancestor had so remained in said possession of the lands claimed by them for three years or more before the institution of suit by pl't'ffs, then you will find in favor of the def'ts, Watson, Bartlett, & W. H. Jones, on their plea of limitation; but the court refused to so charge the jury, but on the contrary the court charged the jury in substance as follows, viz: "But the pl't'ffs claim that in May, 1857, before the defendants had been in possession for the period of three years of any of the lands within the conflict, their possession was interrupted by the entry upon the Basquez grant of James Marlin, as the agent of M'r's Eberly. If you find this fact to be as the pl't'ffs claim, that James Marlin entered upon the Basquez grant in 1857, as the agent for M'r's Eberly, claiming title to the whole in her name, we instruct you that from that time the possession of the def'ts, they holding under a junior title, was restricted to the lands actually occupied by them, and could not be extended by construction to the bounds called for by their paper-title," to all of which rulings of the court def'ts, by their counsel, then and there except, and pray a bill of exceptions, which is granted, signed, and made part of the record.

Feb'y 28, 1877.

[SEAL.]

W. B. WOODS,
U. S. Judge.

142 *Defendants' 7th bill of exceptions.—Filed March 1, 1877.—M. Hopkins, cl'k.*

BAILIE PEYTON ET AL.
v.
W. S. HUNNICUTT ET AL. }

Be it remembered that on the trial of this cause the def'ts introduced

and had sworn F. Pressler, who testified in substance that he held the office of draftsman in the general land-office of the State of Texas; first held the possition in 1846, for a few months, and was again so employed in 1850, and had so continued to the present time; that he is the custodian of the maps in said office. He identified an old map, here shown to the jury, entitled "Map of Robertson's Colony, dated June, 1839; also a map dated 1846; one dated 1847; map of Falls County, dated Sept., 1855; one of Falls County, dated Aug. 16, 1868, and one dated Dec., 1874, from all and each of which maps it appeared that the Basquez grant was not plotted on the upper reserve line, but some distance below the same, estimated by the witness from the scale to be about two thousand varas.

Witness testified that these maps were the official records and archives of the land-office, and that of his personal knowledge since 1846, until after the decree of the district court of Falls County in 1871 or '2, in the case of Huckens vs. Poole, the official maps of said department always represented the Basquez grant as situated below said reserve line, and since that decision said survey had been represented by red lines as pl't'ff's now claim it, and by black lines on same map at the same place as on old maps.

Def'ts here offered in testimony a certified copy of a sketch from the map of Falls County, dated Dec. 24, 1874:

(Here follows map marked "page 143.")

144 Def'ts also read in testimony the depositions of Emeline D. Taylor, as follows, viz:

Interrogatories to be propounded to M'r's Emmaline D. Taylor, a witness for def'ts.

Int. 1st. Please state whether or not you were related to Francis Smith and Christopher H. Sterne; and, if so, your relation with each.

Int. 2d. If you should answer that Francis Smith was your father, that C. H. Sterne was your former husband, please state whether they are living or dead; if dead, when and where did they die.

Int. 3d. Did you have any brothers and sisters that survived your father? If so, please give their names; and, if dead, at what age did they die? Did your mother die before or after the death of your father?

Int. 4th. Did you inherit any land from your father; and, if so, where are said lands situated?

Int. 5th. If you should say that C. H. Sterne was your former husband, please state when and where you were married.

Int. 6th. Did you ever live in Falls County; if yea, when and how long, and in what portion of said county?

Int. 7th. Please state whether or not Francis Smith ever lived in Falls County; if yea, when and how long, and in what part of said county did he reside?

Int. 8th. If you should say that Francis Smith lived in Falls County at an early day in the settlement of said county, at the Falls of the Brazos, state whether or not he at that time claimed to own any land in said county; and, if so, where was it situated with reference to said Falls of the Brazos.

145 Int. 9th. If you should say that Francis Smith claimed to own the J. M. Sanches two & one-half league grant, lying one-half on each side of the Brazos River, at the Falls, state whether or not he

lived on said land; if so, when & how long, and what improvements, if any, did he have on said land.

Int. 10th. If in answer to the 6th interrogatory you should say that you, with your husband, C. H. Sterne, ever lived on said Sanches grant in Falls County, please state when and how long you lived on said land, and on what particular part of said grant did you live.

Int. 11th. State whether or not you and your husband were in the actual possession of any portion of said J. M. Sanches grant at the date of your sale to Churchill Jones; and, if so, what portion. Was any part of it in cultivation; if so, what part?

Int. 12. Did Francis Smith in his life-time place any tenant in possession of said Sanches grant? If so, give the name of such tenant and the time and terms of his occupation.

Int. 13th. State whether or not Francis Smith or you ever knew of any conflict between the Sanches and a four-league grant in the name of Gregorio Basquez. State any circumstance or facts upon which you ba se your conclusion.

THOMAS HARRISON & GOODRICH,
And CLARKSON,
Att'ys for Watson, Bartlett & Jones.

Cross-interrogatories propounded to M'r's Emmaline D. Taylor, a witness for defendants.

146 1st X. If in answer to direct interrogatories 9, 10, 11, & 12, you say that Francis Smith, yourself, and former husband, C. H. Sterne, or any tenant under you or the said Smith, were ever in possession of any part of the said J. M. Sánchez grant, then state whether or not said possession was continuous and uninterrupted; state also the date of the entry upon the land, and the length of the possession of each party, and further specify the particular portion of said Sanchez grant which each of said parties occupied.

2nd X. Do you not know that neither you nor the said Smith, nor any one occupy *any* under or through you or him, were never in possession of any portion of the Basquez four-league grant, inquired about in direct interrogatory 13, or any portion of the said Sanchez grant said to be in conflict with the said Basquez?

STOCKDALE & PROCTOR,
PEELER, MONTGOMERY & FISHER,
Att'ys for Pl'ffs.

In circuit court of U. S., western dist. of Texas.

BAILIE PEYTON ET AL.
vs.
W. S. HUNNICUTT ET AL. } No. 1552.

STATE OF TEXAS,
County of Harris:

By virtue of the annexed commission to me issued by the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the western district of Texas, by its clerk, dated August the 18th, 1875, in said numbered suit, J. E. Simmler, a notary public in and for Harris County, Texas, caused M'r's Emeline D. Taylor, the witness named in said annexed commission, to be and appear before me, at my office at the city of Houston,
147 in Harris County; and she having been by me first duly sworn, made answers to the direct as well as to the cross-inter'g's hereto annexed to said commission, as follows:

Answers to direct interrogatories by witness, Emmaline D. Taylor.

Answer to int. 1st. I am the daughter of the late Francis Smith, and Christopher H. Sterne was my first husband.

2nd. Witness answers to 2nd inter'g.: They are both dead; my father died the 20 of March, 1836, at Independence, in Washington County, Texas, and my husband died on Galveston Bay, on the 23d day of March, 1852.

3d. Now, my brother and sister died a long time before my father died; their names were Mary & Augustus. She died after my father. My brother and sister above named died in Victoria, Texas, about forty-eight years ago.

Answer to D. int'g. 4. Answer of same witness. I did. I got from my father by inheritance about three leagues and one-half of land. Two leagues & one-half were located at the Falls of the Brazos, lying on both sides of the Brazos River, and my father's head-right was located in Burleson County, Texas.

Int'y 5. We were married at Independence, Washington County, Texas, on the 22nd day of May, 1839.

Int'y 6th. I did live in Falls County, Texas. I lived on the two and one-half of a league tract of land some time in the fall of eighteen hundred & forty-six or seven, and stayed thereon for four years thereafter; but held the land in our possession by occupancy five years before we went to move on said lands, by having some one to occupy it under some contract made by my husband, or administrator, or guardian, the particulars of which I do not now recollect. I do not now know
148 in what portion of the county said lands are.

Int'y 7. He did live in Falls County (but then it was a portion of Milam County, I think). My father lived there, to the best of my recollection, some six or seven years before he died.

Answer to D. int'y 8. Answer of same witness to int'y 8. All what I recollect about it is, that he lived on the same hereinbefore-described lands, and had a trading-house on the same, at the Falls of the Brazos; he lived on the east side of the river.

Int'y 9th. To the best of my recollection my father resided on said lands, which were lying half on each side of the river Brazos, but he had his improvements on the east side of the river, and resided thereon for seven or eight years. He had built a trading-house, and had a field on each side of the river.

Int'y 10th. Myself and my husband C. H. Sterne lived on said Sanchez grant from the fall eighteen hundred and forty-six, and remained thereon, on the west side of the river, in said grant and nearly opposite the falls.

Int'y 11. Yes, we was in actual possession of a portion of said J. M. Sanchez grant, at the date of sale to Churchill Jones, on the west side of the river; we had under cultivation both fields, which were on each side of the river.

Int'y 12th. Not that I know of, as he was living on the lands himself, but had a store on the premises, and a clerk under his employ.

Answer to D. int'y 13. I never heard anything about it. Not knowing anything at all about it, I cannot form any conclusions, or circumstances, or facts, nor did I ever hear my father talk about such land conflict.

EMELINE D. TAYLOR.

149 Answers of Emeline D. Taylor to cross-interrogatories.

X-int. 1st. Yes. The possession from the time Francis Smith lived on said land up to the time of myself and my husband leaving the Sanchez grant, after we sold our interest in said land, was uninterrupted and kept in constant possession. My said father was living on said Sanchez grant at the Falls of the Brazos, on the east side of the river, some three or four years before the deed was made to him. I do not now recollect the date when my father first entered and took possession of said lands, except at the time above stated. Myself & husband went and took possession of said lands in the year eighteen hundred and forty-six. There was an agent left, either engaged by the administrator or some other persons who had charge of my interest in my father's estate; it was probably the administrator or my guardian, Joh' P. Cole, but the lands were held under our control. It is the same tract of land which we all occupied in said Sanchez grant, as already previously described to jury, by my father, by an agent under us, and by myself and husband, until the time we sold our said lands to C. Jones.

Ans. to X-int'y 2d. Answers of same witness to cross-int'y. As previously stated, and I do repeat it again, that that portion of the Sanchez grant, viz, two and one-half of a league, and already previously described, have been kept in possession by my father, and afterwards by agent appointed by my guardian or the administrator until I became of age, by marriage, after which time myself and my husband
150 moved thereon, and took the same under his charge, until the time we have given up possession to Churchill Jones, the present occupant. I do not know anything at all about a conflict in the Basquez four-league grant and the Sanchez grant; never heard anything about it.

EMELINE D. TAYLOR.

Def'ts also read in evidence deposition of W. R. Reagan, as follows, viz:

Interrogatories to be propounded to Judge W. R. Reagan.

Int. 1st. How long have you resided in Falls County, and what has been your occupation or profession during the time?

Int. 2nd. Are you acquainted with the location of the Gregorio Basquez four-league survey in Falls County as now claimed by the pl't'ffs in this suit? Have you ever had occasion to make any examination on the ground with the view of ascertaining whether or not the said location as claimed by pl't'ffs is the correct location of said survey? If so, when, and with whom, and what discoveries, if any, did you make as to lines, corners, measurements, &c.

Int. 3d. Were you acquainted with James Marlin in his life-time? Did you ever hear any conversation with him in reference to the location of said Basquez survey? If so, please state it.

Int. 4th. Please state whether or not the bounderies of said survey, or any of them, have been fixed at any one place, by general rep-
151 utation in the neighborhood, or acquiescence of adjoining proprietors, previous to the year 1858, or since that time?

THO'S HARRISON &
GOODRICH & CLARKSON,
Att'ys for Watson, Bartlett & Jones.

H. L. Bennett, agent, to W'm R. Reagan.—Lease.

THE STATE OF TEXAS,
County of Falls:

This indenture, made the 15th day of October, 1874, between H. L. Bennett, as agent of F. S. Stockdale, adm'r of the estate of Peyton B. Lyth, deceased, and W'm R. Reagan, of said county, witnesseth:

That the said H. L. Bennett, as agent of F. S. Stockdale, as aforesaid, do by these presents lease unto W'm R. Reagan aforesaid the following-described tract of land, to wit:

Within the Basquez four leagues, and known as the portion east of Cobb's and west of a lease heretofore given to D. M. Barclay and George Kyle, more particularly described as follows: Beginning at a point where the south line of the Basquez four leagues crosses the south line of a survey made for N. F. Rogers; thence N. 71 E. to Barclay and Kyle's western line of lease; thence N. 30 west to the north boundary of the Mathers tract; thence S. 60 west with said Mathers line to the N. E. corner of said Cobb's survey; thence south with Cobb's line to old S. E. corner; & thence south 60 west with Cobb's southern line to the place of beginning; containing two hundred acres, more or less, to have and to hold unto the said W'm R. Reagan & his heirs & assigns from
152 year to year until it is offered for sale, and he, the said Reagan, shall then have the privilege of purchasing, as barren land, having such improvements as he may put on the said land, this the 15th day of October, 1874.

H. L. BENNETT,
As agent of F. S. Stockdale, administrator of Peyton B. Lyth, deceased.

Witness:
M. M. COLEMAN.
J. M. DARRAH.

THE STATE OF TEXAS,
Falls County:

Before me, Ja's M. Hart, clerk of the district court of Falls County, personally came M. M. Coleman, a subscribing witness to the foregoing instrument, who, being duly sworn, stated on oath that he saw H. L. Bennett, as agent of F. S. Stockdale, administrator of Peyton B. Lyth, deceased, subscribe the same & acknowledge that he did so for the consideration & purposes therein stated, and that he signed the same as a witness at the request of the said H. L. Bennett, & saw J. M. Darrah do likewise.

Witness my hand & official seal, at Marlin, this 3 day of Nov., A. D. 1874.

[SEAL.]

J. M. HART,
C. D. C. F. Co., Texas.

Filed Nov. 3, 1874, at 10 o'clock a. m.
Recorded January 9, 1875.

STATE OF TEXAS,
Falls County:

I, James M. Hart, clerk of the district court of Falls County, Texas, do hereby certify the foregoing to be a true and correct copy
153 of a lease from H. L. Bennett, as agent for F. S. Stockdale, administrator of the estate of Peyton B. Lyth, deceased, to W. R

Reagan, as the same appears of record on Falls County record, record of mortgages book K, page 358 & 359.

To certify all of which witness my hand and official seal of said court, at office in Marlin, this July 21, 1875.

JAMES M. HART,
Clerk D. C. F. Co., Texas.

Cross-interrogatories to be propounded to the Hon. W. R. Reagan.

1st X. What is your profession, and were you at any time a surveyor?

2nd X. To the same. Are you not a party defendant of record of this suit? If you answer in the affirmative, please state whether you have yielded, or agreed to yield, to plaintiff's superior title, and floated your certificate, upon which you formerly contested plaintiff's title, and obtained a patent upon said certificate elsewhere; and in this connection state whether you did not, on the 15th day of October, 1874, take and accept a lease from H. L. Bennett, attorney in fact of F. S. Stockdale, administrator of Peyton B. Lyth, deceased, for two hundred acres of the said Basquez four-league grant, and is not Exhibit A, herewith filed, a correct copy of said lease?

3rd X. To same. Does not the said lease embrace in its bound-
154 aries all of the land for which you were sued in this action? If it does not cover all said lands formerly claimed by you, state how much land so claimed by you is omitted in said lease, and where the same is situated within said Basquez grant; and in this connection please state whether you rely on said lease or will assert your title as one of the defendants in this suit.

4th X. To same. Please answer each and every question propounded in the following interrogatory: Was there not an action of trespass to try title commenced in the district court of Falls County, Texas, about the year 1868, wherein Rhoda B. Huckins et al. were plaintiffs and Johnathan C. Pool was defendant? If so, were you of counsel for defendant Pool in said action? In this connection please state whether said court did, about the year 1869, appoint four surveyors, experts, to wit, W. S. Hunnicutt (one of the defendants), R. F. Alexander, Rev. Collard, and Bigham, to survey the said Basquez four-league tract, and to report on oath whether the land of defendant Pool, in controversy, was embraced or included in the said Basquez grant. If you answer in the affirmative, state whether the said four surveyors did not report unanimously that the upper line of the Basquez was identical with or the same as the upper line of the Austin and Williams reserve, and that the whole of the Pool land in controversy was within the boundaries of the said Basquez grant. Did you not, as counsel
155 for the defendant Pool, except to the said report, which exception was overruled by the court, and the case submitted to the jury, who found in favor of the plaintiffs in that case? Please state further whether the plaintiffs in said cause did not claim under the said Basquez grant in virtue of a deed from A. B. Eberly and children, owners of the said Basquez grant.

5th X. To the same. After the decision in the said case of Huckens et al. v. Polls, was not the Falls Co. map corrected in the general land-office at Austin, so as to place the upper line of the said Basquez on, and make it coincident with, the upper line of the Austin and Williams reserve line on the east side of the Brazos River? and in this connection state whether the commissioner of the land office has not since that time issued two patents, one calling for the upper line of the said Basquez grant and the other for its lower line.

6th X. To same. If, in answer to third direct interrogatory, you state that you had a conversation with Ja's Marlin in reference to the location of said Basquez survey, state when and where said conversation occurred. Was it before or after he purchased a league and labor of said land, in 1858, from Huckins, attorney in fact of A. B. Eberly? Were your opportunities of knowing the views of said Marlin, relative to the locations and boundaries of said grant, as good as those of his then wife, now M'r's McKenzie.

7th X. To the same. Did not the proceedings of Huckins v.
156 Poole excite a good deal interest in the community, and give considerable notoriety to the upper line of the said Basquez grant?

8th X. To the same. Were you living in the neighborhood of the lower line of said Basquez grant, as now claimed by plaintiffs, in the spring of the year 1858? If so, did you not hear of the fact that Ja's Marlin, M'r Rodgers, the two M'r Crouches, and M'r Bowen compromised and purchased the Basquez title of Huckins' agents of A. B. Eberly? Had not W. S. Hunnicut, about that time, surveyed the Basquez grant, running the lower line so as to include the whole of the Marlin headright and most of the lands then owned and cultivated by said Rogers, Bowen, and the Crouches? Was not this survey and location of the lower boundary of the said Basquez a matter of general notoriety in that neighborhood, and had it not been so generally recognized by the neighbors ever since, with the exception of those adversely interested to the Basquez grant?

9th X. To the same. If, in answer to the 2nd direct interrogatory, you state that you have "had occasion to make an examination on the ground, with the view of ascertaining whether or not said location, as claimed by plaintiffs, is the correct location of said survey; if so, when, and with whom, and what discoveries, if any, did you make, as to lines, corners, measurements, &c." You state that you went on the ground with a view to make discoveries, were you then interested adversely to the Basquez grant, and did you employ a surveyor, and cause
157 him to run lines and make measurements, or did you merely accompany the four surveyors above mentioned? Did you witness and agree with or differ from them in the report which they made, under oath, to the court? Were you able to satisfy the court, on exception, that their report was incorrect, or did the court overrule your exception, and sustain their said report.

10th X. To same. Was not the court-house in Marlin burnt about the year 1872 or 1873, and the papers in the case of Huckins v. Pool destroyed, except the report of the afore-mentioned four surveyors, which was in your possession? Please file said report with your deposition.

STOCKDALE & PROCTOR,
PEELER, MONTGOMERY & FISHER,
Att'ys for Plaintiffs.

Answers of W'm R. Reagan.

Int. 1. To the 1st int. W'm R. Reagan says: I have lived in Falls Co. about twenty years, and most of the time I have been a practicing *surveyor.*

Int. 2. The same says: I have for many years been somewhat acquainted with the controversy growing out of an attempt to locate the said Basquez survey, and I am acquainted with what is now claimed to be its location, as well as with its location as represented on the first maps of the county.

In 1868 I was counsel for the def't in an action of trespass to try title styled Rhoda B. Huckins et al. vs. Johnathan C. Pool, involving
158 a tract of land which the pl'ffs claimed was covered by the said Basquez four-league grant. An order of survey was made in said cause, and four experienced surveyors were appointed, to wit, W. S. Hunnicut, James H. Collard, Rob't Alexander, and Jno. Bigham, to ascertain whether there was a conflict between the lands claimed by the pl'ffs, who claimed under the Basquez, and the land claimed by the def'ts.

I attended the survey as the representative of the def't. The party attending the said survey was composed of twelve or fifteen persons who were interested in the discoveries that might be made as to lines and boundaries. There was much interest taken by all parties concerned in the action of the board of surveyors in this instance for the reason that the true line of the Basquez survey had never been determined satisfactorily to the parties claiming the land it was supposed to cover, if the grant could be located on the ground at all. There was a verbal agreement between the parties interested in the order of survey that each party was to see any and all evidences of line or corners that might be found by the surveyors. When we went upon the ground to begin the work, after consultation, the board of surveyors determined that they would first have to locate the Basquez four leagues in order to determine whether it covered Pool's land, and to do this they determined that it was necessary to first find the upper line of Austin & Williams
159 reserve which was supposed to cross at or near the falls of the Brazos; accordingly they went to the point on the river which was claimed by Hunnicutt to be said reserve line. They then went out from the river at the course N. 71 E., and about six miles from the river some old marks or hacks were pointed out by Hunnicutt on two or three post oak trees in a clump of timber north of Hog Island, which he claimed to be the reserve line. We had passed through timber the greater portion of the way from the river and no evidences of the line had been found until we reached this point.

We then continued N. 71 E. about six or seven miles further, which carried us through heavy post oak timber on the waters of the Little Brazos to where M'r Hunnicutt said he had seen the reserve line, but after long and diligent search the party returned without finding a single mark or evidence that would answer for the reserve line.

They then went back and ran into the river again on what M'r Hunnicutt claimed to be the lower line of the Basquez four leagues. My recollection is that there were no marks of any survey found on that line except a line which had been made by M'r Hunnicutt, as he stated, for the lower line of the Sanchez league and a greater, which was some distance above where the Basquez line should have been found.

When the surveying party reached the bank of the Brazos River
160 the whole matter was talked over, when the question was raised by M'r Collard that if the lower line of the Sanchez, as represented on the west side of the river, was the true reserve line made by Austin & Williams the line as they were placing it on the east side of the river could not be the correct line, as there was not room below it for the Basquez four leagues, but M'r Hunnicutt contended that he had examined the field-notes and maps in the land office, which he said showed a drop off in the reserve line, placing the point where it strikes the river on the west side about three-quarters of a mile below what he claimed to be the reserve line on the east side.

And upon this statement, the other surveyors stating they knew

nothing of these facts, it was agreed that the Basquez might be on the ground claimed by M'r Hunnicutt, supposing what he called the upper reserve line to be the north boundary of the Basquez.

Accordingly the report was made, as I afterwards saw, and signed by all four of the surveyors, but I know that M'r Alexander, and probably M'r Bigham, did not agree at the time that the true location of the Basquez had been found by them.

I was not only with that board of surveyors and saw all they found, but at several other times had the most rigid search made by Hogen Pierson, who was once county surveyor, but now dead, and others, for the Basquez lines, and never was able to find any lines, corners, or distances as called for in its field-notes.

161 Int. 3. The same says: I was acquainted with James Marlin in his lifetime, and heard him talk frequently about the Basquez survey after it was claimed so as to cover his league. It has been so long I cannot remember exactly what he did say about it; but I know this much, that he never did believe that there was any Basquez survey there until after it was claimed to have been located by M'r Hunnicutt in his first survey. My recollection is that he then compromised his league claim with the Rev. M'r Huckins, as the representative of the Basquez interest. This, I think, was about the year 1858.

Int. 4. The same says: Prior to the year 1858, or the time when M'r Hunnicutt claimed first to have located the Basquez, it had no fixed boundaries at any particular place, and very little was said about said grant, and when it was mentioned at all it was always referred to as a grant on the map nearly where the old map placed it, which was below where it is now claimed by the pl'ffs in this suit; and subsequent to that time it has been and is now considered by the people in the immediate neighborhood a doubtful question whether it has been or can be located on the ground, notwithstanding the various reports of surveyors.

X-int. 1. The same says: I cannot say at this time that I have any interest in the result of this suit. I own the Mathews certifi-
162 cate, ⅓ of a league, about six hundred acres of which was covered by the Basquez, as it is claimed by the pl'ffs in this suit; but I have withdrawn that portion of the Mathews which was in conflict with the Basquez, and took a lease from Col. Bennett, as representative of the Basquez interest, for part of the conflict.

X-int. 1st. The same says: I am a lawyer by profession. I have never been a surveyor.

Int. 2d. The same says: I was made a party def't to this suit while my Mathews claim was in conflict with the Basquez; subsequent to the filing of its suit, I took the lease, a copy of which is attached to these interrogatories, dated the 18th day of October, 1874, and refer to the said lease for its terms. If the Basquez held the land, I was to have that title; if it failed, I already had the title. Subsequent to that arrangement I withdrew that portion of the Mathews certificate which was in conflict with the Basquez, and obtained a patent on that portion which was determined to be off of the Basquez, but have not located the balance of the Mathews, nor obtained a patent elsewhere. In regard to the withdrawal of my claim and yielding to the Basquez, I have this to say, that there was a verbal understanding between Governor Stockdale, Col. Peyton, and myself, that at the next term of the Federal court, after the lease was taken, Governor Stockdale, as administrator of Peyton B. Lyth, dec'd, was to execute to me a deed for the land em-
163 braced in said lease, but afterwards, when I saw Governor Stockdale at Austin, the whole matter was deferred to the next suc-

ceeding term of the court at Marlin, when the matter, at another interview, was refer'ed entirely to Col. Peyton, who, after delaying me for some time, coolly informed me that I could not get the land unless I paid him six dollars gold per acre; and, although the suit is still pending and the title not perfected, he declared the land on the market, and tried to press me to pay for it then, or he would sell the land to other parties; and this I hold to be in positive violation of the spirit of our verbal agreement about the matter, as well as with the terms of the written lease. Col. Peyton knows very well that I never would have withdrawn my claim from the land with such an understanding. If this is what you mean by yielding to your superior title, this is the way I yielded.

X-int. 3. The same says: Said lease does not embrace all the land for which I am sued; it only embraces about half, or less than half, of the Mathews conflict for which I am sued. I do not understand that I am to rely alone on said lease, yet I do rely upon it this much, that if the Basquez title holds good, when it is perfected I am to have a deed to the land embraced in the lease at law, barren land price, in the neighborhood. Whether I will set up any defence to this suit I am not now able to answer.

164 X-int. 4. The same says: There was an action of trespass to try title, Rhoda B. Huckins et al. vs. Johnathan C. Pool, in our dist. court in 1868, and I was counsel for the def't. A board of surveyors was appointed, and for further answer to this question I refer to my answer to direct interrogatory the 2d as in part the answer to this. I here state in explanation of the reference made to M'r Hunnicutt in my former answer, that the location of the reserve line where said report puts it was made mainly on M'r Hunnicutt's representations, as the other surveyors did not have that acquaintance with the old surveys in that neighborhood which he had, having, as he stated, been surveying at dif'erent and occasional intervals since the early settlement of the county, and said report was made by said board of surveyors more upon the supposition that the Basquez was located on the reserve line than otherwise; for it was my understanding at the time that the Basquez four leagues could not be located by its own calls, on account of its defective field-notes, being no bearing-trees to its corners, nor any surveys called for, and that unless it was placed upon the reserve line it could not be located; and this I am positive was the understanding of all the surveyors composing said board at the time. I objected at the time to said report, first, because the measurement from the Bra-

165 zos River to Isaac's Creek, as called for in the field-notes of the Basquez, did not correspond with the line adopted for the reserve line by nearly a thousand varas, and there was no mark at all between the river and the creek on said line; secondly, because the meanders of the river does not suit the Basquez, judging from the comparative length of the side-lines; thirdly, at both the points where the legs of the survey rest upon the river there is unmistakable evidence that there must have been trees standing at the date said survey purports to have been made, to which practical surveyors must have referred had the lines been actually run upon the ground. I did, as counsel for the def't, except to said report, the exceptions were overruled and the cause determined by the jury in favor of the pl'ffs. I appealed the cause to the supreme court, and after the perfect transcript was completed and filed in the supreme court, the pl'ffs were afraid to risk the chances and com-

promised the suit with me, and immediately filed upon all the territory covered by the Basquez claim, which was not already titled land.

X-int. 5. The same says: After the judgment was rendered in the Huckins & Pool case the commissioner of the land-office did place the Basquez four leagues on the map where said report represents it; but my understanding is that the question of the true position of the Basquez on the map in the land-office is yet undetermined, notwith-
166 standing it has been so far recognized as that some pat's have been issued, where the land is known to be outside of what is claimed to be the Basquez boundaries, and that this question will not be finally settled until it is determined whether the Basquez is there at all or not, and if so, what its true boundaries are.

X-int. 6. The same says: I had frequent conversations with M'r Marlin, mostly before he compromised with M'r's Eberly, for his league claim in 1858. I can only remember what his views were. He did not believe, up to the time that Hunnicutt made his survey, locating the Basquez, that there was any Basquez survey there; I mean covering the Marlin or Byer league. He only yielded, under the advice of his counsel, to said compromise. I don't pretend to be as intimately acquainted with M'r Marlin as his wife was.

X-int. 7th. The same says: The proceedings of the Huckins and Pool suit did excite considerable interest in this community, and give some notoriety to the upper line of the Basquez grant as it is claimed by said report, because neither the upper line of the reserve nor the upper line of the Basquez had ever had any notoriety or even an existance in the minds of the community at said point at or prior to the time of said report in said cause.

X-int. 8th. The same says: I was not; I lived in the town of Marlin at that time; I did hear that Marlin, Rogers, Bowen, and the
167 Crouches compromised with Huckins after M'r Hunnicutt located the Basquez about the year 1852. I don't know as I did not live there. Hunnicutt's lower line of the Basquez has been known and recognized since it was run.

X-int. 9th. The same says: In answer to this interrogatory I refer to my answer to direct interrogatory the 2d.

X-int. 10th. The same says: The court-house was burnt in 1872. I am not able to say what papers were burned. I cannot file said report herewith as it is not in my possession.

W'M R. REAGAN.

Deposition of George T. Robinson.

Def'ts also read in testimony the deposition of George T. Robinson, to wit:

George T. Robinson to the 1st interrogatory says:

Int. 1st. Since Dec., 1850. Have lived in Texas since Jan'y, 1850.

Int. 2d. Was not acquainted with Francis Smith nor John Marlin. Both of them are dead; John Marlin died, as I learned from his children and tradition of the country, in 1849, on his headright league of land and buried near his house on said headright, as his grave was pointed out to me by his son Rufus Marlin. I don't know when Francis Smith died, but always understood his home was at Falls of the Brazos, where he had lived for years.

Int. 3d. I never knew Francis Smith, but knew Emeline D. Sterne, who was known and recognized as the daughter and only surviving

child of Francis Smith. I spent some time with her and her husband
in 1850, in July and August of that year, on Sanchez grant,
168 at Falls of Brazos.

Int. 4. Never knew John Marlin or his wife, but knew their children, viz, W'm N. P. Marlin, Rufus, Ashley, and Ankly Marlin, M'r's Blain, and M'r's Wimberly.

Int. 10th. I am acquainted with a survey of one league and a quarter, in the name of José Maria Sanchez, on east side of the Brazos, near the falls; also the John Marlin headright league partly in conflict with said Sanchez, and have known them since 1850, at which time I found a field on the Sanchez, at the falls, owned and cultivated by C. H. Sterns, husband of Emeline D. Sterns, and which was said at that time to have been cleared and cultivated by Francis Smith during his life-time. On the John Marlin league of land I found the largest settlement in the country at that time, and which appeared to have been occupied for many years. The houses and fences were substantial and generally of cedar, with about fifty acres land in cultivation. The said improvements, when I first knew them, were occupied by the John Marlin heirs, and were afterwards rented by the said Marlin heirs to James Mc Donald and his father, who retained the same until there was a compromise and sale by said John Marlin heirs to C. Jones, who owned the José M. Sanchez survey upon which most of said Marlin league of
land was located. After the compromise or purchase of said
169 land by C. Jones, and expiration of lease of the McDonald's,
I and my brother, Austin Robinson, rented and cultivated it for five years, when Zenas Bartlett, who married oldest daughter of C. Jones, took possession of the same and has owned and cultivated the same ever since, every occupant adding more and more improvements annually. C. Jones took possession of the Sanchez survey in the fall of eighteen hundred and fifty, upon which he made his plantation, and there must be at this time on said two surveys of land two thousand five hundred acres in cultivation, with all necessary gin-houses, tenant, &c., for the successful cultivation of the same.

Int. 11. I am acquainted with line now claimed as upper line of Basquez survey; I knew nothing of location of Basquez only from representation on the old county maps, but it was never supposed to be, before that time, as high up the river as where it is now claimed to be.

Int. 12. I don't know distance between the two, and never heard Basquez was located where now claimed previous to 1857.

Int. 13. I have lived at and near the Falls of the Brazos nearly twenty-five years; I am interested in lands in the neighborhood, and I am acquainted with the lines and surveys.

Int. 14. From about 1857 or 1858 public opinion became divided as to the location of the Basquez grant; some supposed it to be where now claimed by plaintiffs, others supposing it some distance below, as stated
heretofore.

170 Int. 21. The improvements on A. E. Watson's plantation amount
to four hundred acres or more of improved land, with the necessary gin-houses, tenant-houses, &c., for the successful cultivation of the same, and I estimate the value of such improvements at this time to be about fifteen thousand dollars. I also estimate the improvements on Z. Bartlett's to be about two thousand five hundred dollars, the improvements on both places being very good.

Int. 22. In 1854, George Arnold, under a contract with C. Jones, started a saw-mill on the Sanchez survey, just about the line now claimed by plaintiffs as the upper line of Basquez, but used the timber by authority

and consent of C. Jones both above & below said line indiscriminately, and in 1856 said Arnold moved into the bottom and put up a steam saw-mill for himself and C. Jones below said upper line of Basquez, and on the conflict, as now claimed by plaintiffs, of the Basquez with the Sanchez and John Marlin surveys; after running said mill one or two years George Arnold, who, as I understood, owned one-half interest in the mill and machinery and who received half the profits, putting his services against location and timber privileges, which were owned exclusively by C. Jones, sold his interest to said C. Jones and left for one or two years, when he again returned and purchased mill and machinery of C. Jones, but no land, and entered into obligation to furnish him a
171 certain quantity of lumber at different times for the use of situation and timber privileges. In the interim of Arnold's leaving and returning, stated above, C. Jones employed Grier at one time and Collins at another, under different contracts, to run said mill. George Arnold moved the mill several times, but on the part or parts of land now claimed as in conflict with the Basquez, never getting off of the same. George Arnold left the country again some time in the year 1866, leaving other tenants or occupants upon the place, most of whom continued to remain by authority and consent of C. Jones; other tenants were also put upon the land now in controversy and worked and cultivated the same until and after the fall of 1869, when said part or parts of land fell into the hands of A. E. Watson, who married a daughter of C. Jones, who claimed and held the same under an order of partition of the estate of C. Jones; it being a part of the distribution share of said estate to M'r's Watson; said A. E. Watson has occupied, improved, and cultivated said part or parts of land ever since, with the exception of a small portion or portions, which by the partition aforesaid were allotted to W. H. Jones and M'r's Z. Bartlett, children of C. Jones. I know not exactly of the different contracts under which George Arnold remained on the lands of C. Jones, but know that he never made any purchase of any of said land, and I further know that no one has ever occupied
72 said part or parts of land in controversy under the Basquez title or adverse to the titles by C. Jones since my acquaintance with the same.

X-int. 1st. I am fifty years old, and live within about three miles of the line claimed as the reserve.

X-int. 2d. The heirs of C. Jones are cousins of mine.

X-int. 3d. I am not directly or indirectly interested in the suit against any of the heirs of C. Jones, but I am interested against the Basquez; only to such an extent, however, as to feel almost indifferent about it.

X-int. 5th. John Marlin settled in the northeast corner of his headright league, but I don't know at what time.

X-int. 6. The John Marlin settlement was made about one and a half miles above the line claimed as the reserve, and they are in the possession of Z. Bartlett.

X-int. 7th. John Marlin lived on this settlement from the time he took possession up to the time of his death, as I understood from his own children and current report of people living here.

X-int. 8th. I learned from C. H. Sterns and his wife and others that Francis Smith settled at or near the Falls of the Brazos on the Sanchez survey of land, about a mile above the line claimed as the reserve line.

X-int. 9th. I have answered before; never knew or heard of Basquez survey being anywhere else than as represented on old county maps
173 until about 1857 or 1858. I know that J. H. Pierson, who was a surveyor, always believed the Basquez survey to be lower down on

river, as represented on old maps; said Pierson was not interested directly against Basquez. I have already answered James Marlin's knowledge of the Basquez survey.

X-int. 14th. Nearly all improvements on the plantation of A. E. Watson and all on the part owned by Z. Bartlett were made by them, or at their own expense, to the best of my knowledge. I understood that a part of Watson's plantation was cleared by tenants using the same a stipulated time as a consideration, and a few log cabins built by them. Any further I do not know.

X-int. 15. I don't know of any written contract ever made between C. Jones and George Arnold.

X-int. 16. I know A. Robinson and Fredric Faune. A. Robinson lives in Marlin, and Faune lives at Hog Island. A. Robinson formerly lived on his plantation, nine or ten miles below Marlin, on the Ealy Montgomery headright quarter league of land. Fredric Faune formerly lived with George Arnold, and on the part or parts of land now in controversy.

GEO. T. ROBINSON.

Def'ts also read in evidence deposition of T. G. Poole, as follows:

T. G. POOLE, to the 1st interrogatory, says:

Int. 1st. I have resided in Falls County twenty-four years—in 1851. Born here in 1833, and I have lived here since that time.

Int. 10. I am not acquainted with the José Mariah Sanchez by
174 actual survey, neither am I acquainted with the Jno. Marlin headright league by actual survey. I have never assisted in surveying any land in Falls County, on the east side of the Brazos River.

Int. 11. (Struck out.)

Int. 12. I do not know the exact distance, but I would say that it was two or three thousand varas, or may be more. I cannot remember the dates when Hunnicutt first claimed the location of the upper line of the Basquez to be at the mouth of Gleason's Creek. Hunnicutt and Pierson, about that time, run those lines, the former claiming the line at the mouth of Gleason's Creek, and the latter at about the mouth of Old River.

Int. 13. I have lived in six miles of the Falls of the Brazos for twenty-four years. Our family has been interested in lands near the falls, but I have not, other than a probable inherited interest. I am not acquainted with the lines there, only from reputation.

Int. 14. I have answered the best I can in my 12th answer.

Int. 14. (Struck out.)

X-int. 1st. I am forty-two years old. I do not know exactly where the reserve is.

X-int. 2d. If I am related to any of them I do not know the fact.

X-int. 3d. If the Basquez is located near the mouth of Old River and down the river, and the Sanchez on the east side of the river, from
175 the mouth of Gleason's Creek, and up the river, I might have an inherited interest in the J. C. Pool pat'd survey, between the two grants.

X-int. 9. I mean by general reputation, as used by me, the opinion of our own family, to include my uncle, a surveyor, Hogan Pierson. I may have heard others speak of the matter, but I cannot remember who they were nor how many.

F. G. POOL.

Def'ts also read in evidence depositions of B. Killebrew, as follow:

B. Killebrew, to the 1st interrogatory, says:

Int. 1st. About 22 years, in 1852; 25 years in Texas.

Int. 10th. I am; I am. I have known the surveys about 22 years. When I first knew the Marlin place, in 1852, there were some log-cabins on it, and 25 or 30 acres of open land. On the Jones place, Pruet and Austin Robinson had a considerable negro quarter. I think Jno. P. Marlin had possession of the Marlin place, and Pruet, the overseer for Jones and Austin Robinson, had possession of the Jones place. Austin Robinson was on the place with Pruet, but I do not know whether he was merely living with him or had an interest on the place. The Marlin heirs had possession of the Marlin place when I first knew it. McDonald next held as a renter for two or three years, may be more or less. It was next in possession of George and Austin Robinson. They held two or three years, or may be longer. Z. Bartlett next came in possession, and has held ever since. Jones may have cultivated it a while between the occupancy by George & Austin Robinson and
176 Bartlett. One S. D. Long occupied it a while between the occupancy by the Robinsons & Bartlett. After and since the occupancy by the Marlins, all the occupants held under authority from C. Jones. The Jones place, or the place then called the Falls place, was occupied when I first knew it by Pruet, overseer for Jones, and was by him cultivated for Jones. Said Jones and his heirs have held and cultivated it ever since—for the whole time, twenty-three years.

Int. 11th. I do not know exactly where that line is claimed to be located by the plaintiffs, only that they claim its location higher up the river than where it was originally supposed to be. I only know that it was once supposed to be located a few miles lower down the river than at present claimed by plaintiffs.

Int. 12th. I do not know the distance. Before 1859 I never heard of its location being claimed as high up the river as now claimed by plaintiffs.

Int. 13th. I have never lived nearer the falls than in the town of Marlin—say four or five miles. I have lived in and about Marlin ever since I came to the country. I never was interested in lands in that neighborhood. I am not well acquainted with the surveys and lines there.

Int. 14th. Previous to the year 1857 the upper line of the Basquez was said to be near the lower corner of the James Marlin, s'r, headright. Of late years some have claimed the line to be some distance higher up the river, as stated before.

Int. 14th. (Struck out.)

177 X-int. 1st. I am forty-nine years old. I live nine miles from where I understand the reserve line strikes the river.

X-int. 2d. I am not related to any of them that I know of.

X-int. 3d. I have no interest one way or another, neither directly or indirectly.

X int. 4th. I mean that I was told by persons living in the country where the location was. I have heard numerous persons speak of it, but I cannot locate them by name; among them were James Marlin, s'r, Cha's Smith, Sam Blaine, and Elbert Golson. The above-named persons are all dead. I think they claimed adverse to the pl'ffs, except Golson.

B. KILLEBREW.

Def'ts also read in evidence the deposition of W. S. Poole, as follows:

Deposition of W. S. Poole.

W. S. Poole, to the first interrogatory, says:

Int. 1st. About 24 years. I first lived in said county in 1851. I have lived in Texas since 1838, being a native Texian.

Int. 10th. I am tolerably well acquainted with the Sanchez league and a quarter. I know of the John Marlin headright league, but I am not familliar with the lines thereof. I have known of these surveys nearly ever since I came to the country. When I first knew the Sanchez there was a pretty good farm on it; also, a gin-house and some cabins. I think Churchill Jones, now dead, had possession of the improvements on the Sanchez survey. There was very little, if any, improvement on the John Marlin league when I first came to the county that I know of.

178 There is a very large improvement on the Sanches at the present time. I know of no one that I can now recollect who ever had possession of these improvements outside of the Jones family. I know nothing of the improvements and occupation of the Marlin place of my own personal knowledge.

Int. 11th. (Struck out.)

Int. 12th. (Struck out.)

Int. 13th. I never lived more than five miles of the Falls of the Brazos. I have been interested in land in that neighborhood. I am pretty well acquainted with some of the lines & surveys there.

Int. 14th. (Struck out.)

Int. 14th. (Struck out.)

Int. 15th. (Struck out.)

Int. 16th. He done a great deal of surveying in Falls County. I think his experience was very extensive.

Int. 17th. He did surveying in that neighborhood. I knew it because I was with him, assisting him. I assisted him over there at various times from about 1857 to 1860.

Int. 18th. I was employed with Pierson in surveying around the falls on sundry occasions for two or three years. We had for our object to ascertain the amount of vacant land between the Basquez and Sanchez grants.

Int. 19th. He did at various times when I was with him. He searched for the boundary-lines of the Basquez all around where he supposed the lines were. He found no lines which he believed were the boundary-

179 lines of the Basquez. I have heard him say that if it could not be located by the plats, that no surveyor could locate it. According to the plat, he believed the location to be, as before stated, from a point on Old River, below the falls, down the river. He never showed me any line of said Basquez. I do not know the boundary-lines of the Marlin league, and I never heard Pierson say; but I think the Basquez line on the north was below said league.

Int. 20th. I was acquainted with James Marlin. I saw him while I was engaged there. We were meandering the river below the blue shoals where we left the river, and struck out for Marlin (town); about the edge of the town we struck down old marks, upon which we set the compass. The line ran at the right or the proper degree for the Basquez, but it soon give out. While we were testing this line James Marlin came to us and enquired what we were doing. He was informed that we were trying to locate the Basquez. He said there was no Basquez li e there, and that he knew where the line was, and that he would

show it to us if we would stay all night with him. Soon thereafter we stayed all night with him for the special purpose of finding the said line, but he said that he had never seen any line—marked line—of the Basquez, and that he had never seen the beginning corner or the post at the beginning corner, which was marked P. Pierson enquired why he said, a few days before, that he knew where the line was. He answered that he was anxious for the Basquez location to remain where it was supposed to be, and I think he said he had compromised
180 with the Basquez claimants, and that if the Basquez was located it would bring him in conflict with the Bird title.

X-int. 1st. I am thirty-seven years of age, according to the records in our family. If the said reserve crosses the Brazos River at the falls, I live about seven miles below said line.

X-int. 2d. I do not know who are the parties to this suit (i. e.), all of them, and if I am related to any of them I do not know it.

X-int. 3rd. If I have any interest I am not now aware of it.

X-int. 9th. I mean by general reputation, as understood and used by me in reference to the location of the Basquez, concurrence of opinion expressed by such persons as I heard speak of the matter. It is impossible now for me to designate them by name, location, or profession, nor do I know, if I ever did, whether they claimed adverse to the Basquez.

X-int. 10th. I have never been asked to point out any lines of the Basquez, but if I had I could not have done so, because I have never seen any, as before stated.

X-int. 11th. Said Pierson had the field-notes of the Basquez, and I know it because I read them, and they had the appearance of being legally arranged—having the seal attached. I have seen the field-notes of the Basquez several times since that time, and they correspond with the notes held by Pierson.

X-int. 12th. Answered and explained above.

X-int. 13th. W. H. Evans & Perry. Wimberly carried the chain for us when we were doing that work; others were with us during the time occasionally, but I cannot designate them by name at this time.

W. S. POOL.

181 Defendants also read in evidence the depositions of J. D. Oltorf, as follows:

Deposition of J. D. Oltorf.

BAILIE PEYTON AND OTHERS
vs.
W. S. HUNNICUTT AND OTHERS.

Answers of J. D. Oltorf to interrogatories propounded in said suit:

Ans. to 1st int. I live at Marlin, in Falls County, State of Texas Have lived here twenty-one years, on the T. J. Chambers survey.

Ans. to 2nd int. I do not.

Ans. to 3rd int. I never heard of any "reserve" until a few years ago; and can't answer this question.

Ans. to 4th int. I am by profession a lawyer, and have resided at Marlin, Falls County, since the year 1854, or about that time. I can't answer the remaining part of this interrogatory, for the reason already given, that I never knew or heard anything of the "reserve" spoken of

until a few years ago. I think about seven or eight years ago I first heard of this reserve line.

Ans. to 1st cross-int. I have no interest. Would gain nor loose nothing by the establishment of the Basquez grant lower down the river, or by the failure to establish it at all.

Ans. to 2nd cross-int. This is a conditional interrogatory that doesn't require an answer.

Ans. to 3rd cross-int. It seems to me that this interrogatory doesn't require an answer from me.

Ans. to 4th cross-int. I can't answer this interrogatory, because I don't know what public opinion has been, and don't remember to have heard any one speak of it.

J. D. OLTORF.

182 *Testimony of Gen'l Tho's Harrison.*

Def'ts also introduced and had sworn Gen. Tho's Harrison, who testified in substance as follows, viz:

Answers of Thomas Harrison:

1. I am acquainted with one of the plaintiffs and several of the defendants. I know the character of the suit.

2. I am a lawyer, residing now at Waco. I have practiced law in Texas at Houston, Marlin, & Waco since the spring of 1847.

3. I resided in Falls Co., practicing law there, in 1852, 1853, 1854, 1855, perhaps not all of the latter year. I had occasion to inquire and learn of the citizens then residing there about the lines and location of the Basquez 4-league survey. I think my information in regard to this began soon after my settlement there.

4. I do not think there was, during the years of my residence there, any public reputation or notoriety fixing the location or lines of said survey. I do not remember to have heard any one of the old settlers say they knew the location of said grant, or where its lines or either of them were. The precise place of its location was, I think, unknown, but the prevalent opinion and general reputation was that it was lower down on the river than is now claimed by the plaintiffs.

5. The facts above stated are well fixed in my mind by several circumstances, which I will relate: Soon after my settlement at Marlin I purchased from J. W. Lawrence, of Austin, agent, the colonist title to the Andrew Montgomery ¼-league, and afterwards W. M. Wright
183 claimed to have purchased by deeds, which he exhibited, from the heirs of Basquez—the same 4-league survey now claimed by the plaintiffs. I purchased Wright's title supposing that the 4-league survey covered the Montgomery quarter, as was shown, I think, by the old map. The claim of the plaintiffs now is that said survey covers only a part of the Montgomery; their it was the general opinion, as well as my own, that it covered all of it. About the same time Churchill Jones, now dec'd, father and grandfather of several of the defendants, instituted negotiations which resulted in the purchase by him of the John Marlin league from the heirs of John Marlin. I represented the heirs of Marlin in that negotiation. Jones had purchased the Sanchez survey, older than the Marlin, and which cut through the Marlin league, leaving part of it below and part of it above the Sanchez survey. These negotiations were protracted, minors were concerned, and proceedings were had in the probate court to convey their interest to

Jones. There was much talk about it, and interest, I might say public interest, felt in it, yet during all the time, from beginning to end of these negotiations and proceedings, I never heard any one say or suppose that the Basquez 4-league survey covered or touched the John Marlin league. The negotiations were begun, carried on, and finished without regard to that survey. It was the opinion of all of us, and such was the general opinion, that the Basquez was below the John Marlin league.

184 6. The locations and lines of the Basquez grant were not fixed by any public notoriety or general reputation during the years of my residence at Marlin.

The general and prevalent opinion was that it was below the John Marlin league; its exact location was not known. It is hardly possible, certainly not probable, that I can be mistaken in this; it became my interest and duty twice, once professionally and once on account of private interests of my own, as above related, to investigate that subject and to possess myself of the best information in regard to it, and my means of information were ample and reliable. I knew and was intimate with all the old settlers. There were not so many then, and we often met and conversed freely together on subjects like this now in controversy. The Basquez grant was much spoken of when Wright brought in what purported to be the title of the heirs to the same. I must have heard many of the old settlers speak of it. I knew personally and have often conversed with the sons and sons-in-law of John Marlin, with Charley Smith, first chief justice of Falls Co., the Bartons, the Barclays, Menafees, Wimberly, Morrell, Pools, and J. H. Pierson, son of the old surveyor, J. E. W. Pierson, and himself a surveyor, and others, all old settlers, and some of them the earliest of the country, comrades of old John Marlin in the erection and defence of his

185 fort, erected by him and them for protection against the Indians, the ruins of which, I believe, are now to be seen on the land owned by defendant, Bartlett. I believe if the Basquez grant had had known lines and limits I would have heard of them from some of these old settlers. I have now before me the deeds conveying to Churchill Jones the interest of the John Marlin heirs in the John Marlin league; one of them was written by me, and is dated on the 5th of January, 1853. The other by order of court, conveying the interest of the Wimberly minors, was written by my partner, James Cruik, and is dated on the 1st of Feb'y, 1854.

7. I have never seen the upper reserve line, and cannot say where it is, or how it is marked, or how its location is known. I do not remember to have heard of its limits or the location of its lines during my residence in Marlin. I do not think it could have had any general reputation or notoriety during my residence there.

Answers to cross-interrogatories:

I am attorney for some of the defendants, and would consider it my duty to defeat the claim of the plaintiffs by any fair and legal means. To show that the Basquez survey is below the John Marlin league would, I believe, defeat the plaintiffs' claim as far as my clients are concerned, and I would pleased with that result.

2. I do not know that there was any diversity of opinion as to the location of the Basquez grant at an early period. I do not think

186 there was such during my residence at Marlin. I do not think any one pretended to know its precise location. The general impression, I think, was that it was below the John Marlin league. This im-

pression may have obtained from the early maps, which thus located it, as I remember. I should think the knowledge of the surveyor of a recent survey ought to have great weight upon the question of its location. As time passed on it would be worthless, and after many years generally it would be worth but little or nothing upon a question of boundary.

After the lapse of forty years, when the surveyor is dead, I should think the recollection by any one, especially if he be now very old, of what the surveyor should have said in regard to it forty years before should as a rule have but very little weight. I would rather prefer to rely upon the ancient maps, made from the contemporaneous field-work. These are matters of opinion, but my opinion is asked, and I have given it.

THO'S HARRISON.

Testimony of F. W. Johnson.

Def'ts also proved by F. W. Johnson, a witness sworn for pl'tiffs, in substance as follows, viz:

Witness was principal surveyor of Austin and Williams colony in 1832, '3, & '4. W'm Moore and Horatio Christman were his deputies.

In 1832 witness was directed by the emprasarios, Austin & Williams, to have the Brazos River meandered from the San Antonio
187 road up the river, and to lay off a territory 40,000 varas by 60,000 varas square for a reservation, to be subdivided in several parcels for actual settlers, in order to form a dense and compact settlement.

That in December, 1832, witness and his deputy, W'm Moore, began the meandering of said river at the San Antonio road, and having reached a point on said river near the mouth of San Andres River, where witness established the initial point for beginning the survey of the lower line of said reserve, from which point he directed his deputy, Moore, to continue the meanders up said river, and when he should reach a point on said river sixty thousand varas on a right line he should then establish the point where the upper line of said reserve should cross the river.

That witness, after having been engaged west of said river for several months, and some time in the spring of 1833, he arrived at the Falls of the Brazos, having surveyed in the meantime that part of the reserve on the west side of the river by beginning at the point near the mouth of San Andres River, and measuring a line 571 W. 20,000 varas, where the S. W. corner of said reserve was established; thence he run and measured a line N. 19 W. to a point where the N. W. corner of said reserve was established; thence he run a line N. 71 E. towards the river, but owing to the boggy condition of the ground did not
188 reach the river, but ceased the survey in the post-oak timber, some distance from the river.

After arriving at the falls witness proceeded up the river and met his deputy, Moore, and returned with him to San Filipe in July, 1833.

Witness, as the principal surveyor, compiled and copied the field-notes of the meanders of the Brazos River as made by himself and his deputy, Moore, and filed the same as an archive in the office of the emprasarios at San Filipe.

Here an archive from the general land office was shown to the witness, which he identified as the original compilation of the meanders of the Brazos River made by him.

Def'ts here put in evidence certified copy of an extract from said meanders, as follows:

189 No. 4.—*F. W. Johnson. September* 15, 1874.

DECEMBER 18TH, 1832.

Commenced meandering on the east side of the Brazos at the crossing of the old San Antonio road, thence of the river.

N. 82	W.	490	varas.	
N. 66	W.	540	"	
N. 26	W.	200	"	
N. 50	W.	1,000	"	
West		1,080	"	
N. 58	W.	280	"	
S. 71	W.	300	"	
N. 71	W.	940	"	
N. 8	E.	90	"	
N. 68	E.	520	"	
N. 43	E.	330	"	
N. 13	E.	180	"	
N. 36	E.	630	"	
N. 7	E.	150	"	
N. 14½	E.	850	"	
N. 19	E.	380	"	
N. 25	E.	210	"	
N. 29	E.	270	"	
N. 60	E.	420	"	
N. 37½	E.	260	"	
N. 24	E.	820	"	
North		540	"	
N. 20	W.	250	"	
North		160	"	
N. 15	E.	320	"	
N. 8	W.	490	varas.	Barr's corner.
N. 16	E.	230	"	
N. 4	E.	130	"	
N. 15		220	"	Ruvise's corner at Garrison.
N. 34	E.	100	"	
N. 38	E.	310	"	creek opposite.
N. 10	E.	240	"	
North		70	"	
N. 14	E.	240	"	
N. 29	E.	165	"	
N. 63	E.	90	"	
N. 78	E.	40	"	
S. 55	E.	170	"	
N. 89½	E.	140	"	
N. 59	E.	60	"	
N. 46	E.	320	"	
N. 30	E.	120	"	
N. 10	E.	80	"	
N. 8	W.	320	"	
N. 29	W.	440	"	
N. 16	W.	210	"	
N. 39	W.	520	"	
N. 63	W.	570	"	varas.
N. 83	W.	240	"	
	N. 65	W.	240	"
190	N. 50	W.	550	varas.
	N. 22	W.	130	"
N. 64	W.	220	"	
N. 82	W.	360	"	
N. 42	W.	130	"	
North		600	"	
N. 32	W.	200	"	
N. 68	W.	240	"	
N. 81½	W.	480	"	
N. 8	W.	330	"	
N. 25	W.	240	"	
N. 47	W.	220	"	
N. 58	W.	240	"	
N. 86	W.	200	"	
S. 85	W.	840	"	
N. 71¾	W.	420	"	
N. 50	W.	560	"	
N. 40	W.	250	"	
N. 10	E.	160	"	
N. 30	W.	360	"	
N. 18	W.	280	"	
N. 40	W.	320	"	
N. 72½	W.	280	"	
N. 42	E.	290	"	
N. 56	E.	680	"	
N. 22	E.	700	"	
N. 40.	E.	740	"	
N. 45	E.	820	"	
N. 36	E.	130	"	
N. 27	E.	230	varas.	
N. 4	E.	300	"	
N. 12	W.	700	"	
N. 33	W.	860	"	
N. 17	W.	720	"	
N. 56	W.	140	"	
N. 34	W.	530	"	
N. 46	W.	120	"	
N. 68	W.	120	"	
N. 63	W.	150	"	
N. 76	W.	300	"	
S. 80	W.	350	"	
S. 46	W.	150	"	
S. 64	W.	390	"	
S. 50	W.	510	"	
N. 17	W.	210	"	
North		310	"	
N. 46	W.	70	"	
N. 11	W.	280	"	

N. 18	W.	860	varas.	
N. 50½	E.	270	"	
N. 65	E.	320	"	
N. 41	E.	310	"	
	N. 18½ W.	610	"	
191	North	270	varas.	
	N. 11 W.	260	"	
N. 28	W.	200	varas	prairie opposite.
N. 30	W.	1,020	"	
N. 23½	W.	130	"	
N. 34½	W.	350	"	
N. 44	W.	170	"	
N. 51½	W.	650	"	
N. 63	W.	300	"	
N. 71½	W.	620	"	to reserve.
N. 53	W.	1,700	"	
N. 15	W.	900	"	
N. 60	W.	1,200	"	at 800 mouth of San Andres.
N. 15	W.	1,630	"	
N. 60	W.	950	"	
N. 20	W.	830	"	falls or shoals.
N. 35	E.	400	"	
N. 5	E.	1,300	"	
N. 50	E.	840	"	
N. 30	W.	2,500	"	
N. 65	W.	1,000	"	
West		1,100	"	
S. 45	W.	1,100	"	
N. 35	W.	1,300	"	
N. 70	W.	430	"	
N. 45	W.	2,870	"	
N. 10	W.	3,800	"	
N. 50	W.	1,900	"	
N. 2	W.	550	"	
N. 32	E.	490	"	
North		220	"	
N. 30	W.	670	"	
N. 47	W.	4,000	"	blue shoals.
N. 44	E.	510	"	
N. 27	W.	400	"	
N. 73	W.	210	"	
S. 60	W.	1,040	"	
N. 65	W.	1,000	"	upper line of reserve. Fee, $3.
N. 9	E.	220	varas.	
N. 21½	E.	470	"	
N. 12	E.	310	"	
N. 27	E.	260	"	
N. 15	E.	380	"	
N. 40	E.	1,460	"	
N. 65	E.	400	"	
N. 20	E.	450	"	
N. 10	E.	1,400	"	
N. 20	W.	400	"	
N. 25	E.	640	"	
N. 65	E.	470	"	
N. 30	E.	600	"	
N. 70	W.	2,700	"	
North		1,290	"	creek at 90 v's.
N. 15	W.	500	"	
N. 15	E.	400	"	
N. 35	W.	500	"	
N. 13	E.	1,760	"	
N. 80	E.	820	"	
N. 55	E.	420	"	
N. 10	E.	400	"	
N. 65	W.	360	"	
West		2,510	"	
N. 30	W.	590	"	
North		530	"	creek at 300
N. 60	W.	300	"	
N. 90	W.	3,000	"	
N. 10	E.	800	"	
N. 33	E.	1,490	"	
N. 9	W.	860	"	
N. 45	W.	470	"	
N. 70	W.	370	"	
	West.	690	varas.	
192	N. 35 W.	1,870	"	
	N. 15 E.	2,740	"	
N. 45	E.	500	varas.	
N. 6	W.	400	"	
N. 20	W.	1,400	"	
N. 60	W.	1,800	"	creek opposite.
N. 20	W.	370	"	
N. 65	W.	2,315	"	creek at 640 v's.
N. 20	W.	230	"	creek at 100 v's.
N. 50	W.	2,270	"	creek at 700 v's.
N. 5	E.	1,000	"	bayous 640 v's.

STATE OF TEXAS, GENERAL LAND OFFICE,
Austin, September 5th, 1874.

I, Rhoads Fisher, chief clerk and acting commissioner of the general land office of the State of Texas, do hereby certify that the foregoing is

a correct transcript of the "field-notes of the Brazos, 1833 meanders from San Antonio roads," as contained in book of field-notes, "Upper Colony D," of the permanent records of this office.

In testimony whereof I hereto set my hand, and cause the impress of the seal of the general land office to be stamped, on the day and date last-above mentioned.

[L. S.] RHOADS FISHER,
Chief Clerk and Acting Commissioner.

193 Also photograph copies marked X & Y, as follows:

EXHIBIT Y.

N. 45 E., 500.
N. 6 W., 400.
N. 20 W., 1,400. Short Creek opposite, at 1,800 varas.
N. 60 W., 1,800.
N. 20 W., 370.
N. 65 W., 2,315. Cat Creek at 640 varas.
N. 30 W., 230. Creek at 100 varas.
N. 50 W., 2,270. Creek at 700 varas.
N. 5 E., 1,020. Jacob's Bayou at 640 varas.
N. 32 E., 490.
North, 220.
N. 30 W., 670.
N. 47 W., 4,000 v'r's. Blue Shoals. No. 2.
N. 44 E., 510.
N. 27 W., 400.
N. 73 W., 210.
S. 60 W., 1,040.
N. 65 W., 1,000.
N. 42 W., 800.
N. 70 W., 520.
N. 10 W., 360.
N. 27 W., 1,300. Upper corner of reserve on line at 280 var's back.
N. 25 E., 200.
N. 64 E., 300.
N. 45 E., 200.
N. 11 E., 500. Smith's Falls.
194 N. 25 W., 1,300, and S. 9, W. 6.3.
N. 70 W., 420, from an elm 6.
N. 45 W., 2,870.
N. 10 W., 3,800.
N. 50 W., 1,900.
N. 2 W., 550.
N. 40 E., 1,460.
N. 65 E., 400.
N. 20 E., 450.
N. 10 E., 1,400.
N. 20 W., 400.
N. 25 E., 640.
N. 65 E., 470.
N. 30 E., 600.
N. 70 W., 2,700.
North, 1,290. No. 1. Christmas Creek at 900 varas.
N. 15 W., 500.

½ river 3,200 varas, on a straight line
ce of beginning, reserve on river, as
ing the general course of the river
ed measured on this as a general

N. 15 E., 400.
N. 35 W., 500.
N. 13 E., 1,760.
N. 80 E., 820.
N. 55 E., 420.
N. 10 E., 400.
N. 65 W., 360.
West, 2,510.
N. 30 W., 590.
North, 530. Middle Creek at 300 varas.

195 STATE OF TEXAS:

GENERAL LAND OFFICE,
Austin, Feb'y 13th, 1877.

I, J. J. Groos, commissioner of the general land office of the State of Texas, do hereby certify that the two photograms hereto attached are correct copies and true fac similies of the originals contained in Book X of original English surveys of the permanent records of this office.

In testimony whereof I hereto set my hand and cause the impress of the seal of the general land office to be stamped hereon the day and date above written.

[L. S] J. J. GROOS,
Commissioner.

196 EXHIBIT X.

246.
N. 30° W. 230 v's, creek at 100 v's.
N. 50 W. 2,270 v., creek at 700 v's.
N. 5 E. 1,000 v's, bayou 640 v's.
N. 32 E. 490 v's.
North 220 "
N. 30 W. 670 v's.
N. 47 W. 4,000 v's, Blue Shoals.
N. 44 E. 510 "
N. 27 to 400 "
N. 73 W. 210 v's.
S. 60 W. 1,040 v's.
N. 65 W. 1,000 v's, upper line of reserve.
N. 43 W. 800 v's, creek op.
N. 70 W. 520 v's.
N. 10 W. 360 v's.
N. 27 W. 1,200 v's.
N. 25 E. 200 v's.
C. C. P.

GENERAL LAND OFFICE,
Austin, Texas, February 13th, 1877.

I, J. J. Groos, commissioner of the general land office of the State of Texas, do hereby certify that the photograph copy hereto attached is a true and correct copy of "page 246 Book D, Upper Colony," showing in part the meanders of the Brazos River.

In testimony whereof I hereunto set my hand and affix the impress of the seal of said office the day and date last above written.

[L. S.] J. J. GROOS,
Commissioner.

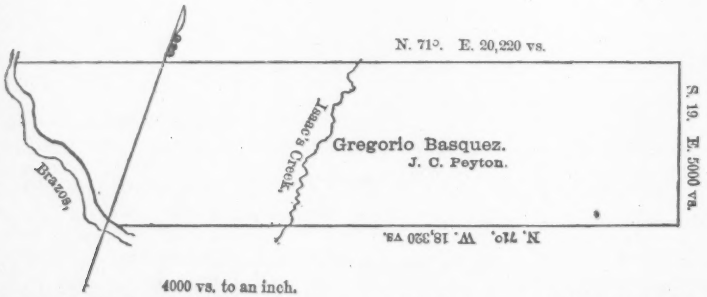
197 Witness stated that the point where the upper line of the reserve on the east side of the river would touch the river should be determined by calculating the distance by the meanders from the Blue Shoals, which was a noted point in said river, and the distance on a right line from said shoals to the call for the "upper line of reserve" is the true place of its location, and it can be determined from no other source.

Witness stated that it was impossible that Moore could have made the survey of the Basquez at any time previous to his return with witness to "San Filipe in July, 1833, because it was after that time that the consent of Austin & Williams was obtained to locate said grant within the reserve. That the land is distant about two hundred miles from San Filipe, and Moore did not again take the field until September or October after.

Witness testified that it was the custom of his deputies to return to him the field-notes of surveys made by them, and witness as principal surveyor reported the survey in proper form to the commissioner who extended title.

Def'ts here offered in testimony the certified copy of field-notes of Basquez four leagues, dated May 11, 1833.

198



Plot and field-notes of four leagues of land surveyed for Johnathan C. Peyton, in the colony of the empresarios S. F. Austin and S. M. Williams, beginning at a post marked P, on the east bank of the river Brazos, running from thence N. 71° E. 10,200 v's to a creek, 20,220 v's to the corner a stake; thence S. 19° E. 5,000 varas to a stake; thence S. 71 W. 18,320 v's to a stake on the bank of the Brazos, and thence up the Brazos, with its different meanders, to the place of beginning, containing four leagues, or an area of one hundred million square varas. Land, one-sixth farming, and the remainder pasture; gro'th, cottonwood, elm, hackberry, oak, &c.

(Signed) F. W. JOHNSON,
P. Surveyor.

WILLIAM DUTY, } C. C.
WILLIAM BEAN, }
GEORGE DARR, marker.
May 11th, 1832.

STATE OF TEXAS, GENERAL LAND OFFICE,
Austin, February 26, 1876.

I, J. J. Groos, commissioner of the general land office of the State of Texas, do hereby certify that the foregoing is a correct transcript taken

from the original contained on page 47 of Book X of original English field-notes, of the permanent records of this office.

In testimony whereof I hereto set my hand and cause the impress of the seal of the general land office to be stamped, on the day and date last above stated.

[L. S.] J. J. GROOS,
Commissioner.

199 Def'ts here introduced the evidence of Dennis Corwin, a witness on the stand, and a surveyor, to prove that by calculation of the field-notes of said meanders the distance from the Blue Shoals, as called for in said field-notes, to the reserve line as called for, was 1,247 varas.

Testimony of R. F. Alexander.

Def'ts then had sworn R. F. Alexander, who testified that from 1866 to 1870 he was surveyor of Falls County; that he knew the location of the Basquez seven-league tract on the Brazos River, which lay above and adjoining the Manchaco grant; that he had measured the distance on the ground from said seven-league tract to the line claimed by pl't'ffs as the upper line of said four-league tract; that said distance is 16,326 varas; four leagues is 20,000 varas—about 3,700 varas short. That the distance from the Blue Shoals (the locality of which he is acquainted with) to the lower line of the Basquez four leagues, as now claimed by the pl'tiffs, is 1,250 varas; that this line is an old marker line; that the distance from the Blue Shoals to the upper line of the Basquez, as claimed by pl't'ffs, is 4,950 varas further, viz, 6,200 varas.

Witness, Alexander, also testified that he found marked on ground another old line, apparently of the same age as the two lines last mentioned, which he traced about two miles. Said line is situated between said upper and lower lines of the Basquez, as claimed by pl't'ffs, and
200 runs parallel with them at a distance of about 3,000 varas below said upper line, and about 3,300 varas above Blue Shoals. If the Basquez field-notes and distances are applied to the land claimed by pl't'ffs, there is found a discrepancy in the call for Isaac's Creek of 1,430 varas, and in the call for the river on the third course there is a discrepancy of 1,656 varas—that is, the distance called for in said field-notes would reach 1,656 varas across the river with the field-notes of the Basquez alone. I could not locate said grant. The Basquez, as now claimed, conflicts with the Sanches survey 700 or 800 v'r's.

Def'ts also introduced and had sworn James S. Jones, who testified in substance that he was the son of Churchill Jones; that he had lived in Falls County in the vicinity of said lands since 1851; that he knows the location of Blue Shoals on Brazos River; owns land near there; from head of Blue Shoals to upper line as claimed by pl't'ffs, is about 6,500 varas.

Before 1857 the Basquez four leagues was not supposed to be where pl't'ffs now claim it; as now claimed by pl't'ffs it conflicts with the Sanchez about 800 varas.

Before Hunnicutt run the line in 1857, never heard of the line where now claimed.

The plaintiffs also offered evidence to show that the original of their testimonio of title had been recorded in April, 1841, in the proper office in Robertson County, Texas, where the lands in controversy were situate, and that before any possession taken by defendants of any

part of the lands in controversy, the tract of land which was con-
201 veyed by the original title of plaintiff had been actually run upon the ground, and they offered other evidence tending to show notice of the then title and the location of the lands claimed under said title.

Whereupon the def'ts Watson, Bartlett, & Jones requested the court to charge the jury in substance as follows, viz:

"If you believe from the evidence that at the date of the purchase by Churchill Jones from the heirs of John Marlin in 1853, the said Jones had no notice by the county map, or other records, or otherwise, of any conflict of the John Marlin league with the Basquez grant, you must find for the def'ts Watson & children, Bartlett & wife, and W'm H. Jones, even if you should find that the location as claimed by the true location of said Basquez grant."

But the court refused to so charge the jury, but the court charged the jury that if they were satisfied from the evidence that the original testimonio of the plaintiff's title had been recorded in the county where the lands in controversy were situate, and the tract purporting to be conveyed by the said testimonio had been actually run upon the ground, the defendants could not claim as purchaser in good faith, without notice.

To which ruling of the court counsel for defendants then and
202 there excepted, and prayed their exception to be noted of record, which is done accordingly.

The foregoing bills of exceptions numbered respectively 1, 2, 3, 4, 5, 6, and 7, were all presented to and signed by the judge on the 28th of February, 1877, and more than five days after the close of the trial of the cause.

The counsel for plaintiffs objected to the signing of the said bills of exception at the time aforesaid, on the ground that they were not presented to the judge within time limited by rule 33 of the court, which reads as follows: "No bill of exceptions will be signed unless presented to the judge within five days after the close of the trial, unless further time be allowed by the court," and on the ground that when said bills were presented to the judge for signature no order of the court had been made extending the time for the presentation thereof.

Signed and sealed this February 28th, A. D. 1877.

[SEAL.] W. B. WOODS,
U. S. Judg

203 *Plaintiffs' bill of exceptions.*

Circuit court of the U. S. in and for the western dist. of Texas, at Austin.

BAILIE PEYTON ET AL.
vs. } 1552.
W. S. HUNNICUTT ET AL.

Upon the application of the defendants, plaintiffs making no objection, it is ordered that the defendants, A. E. Watson, for himself, and as guardian for his minor children, Irene May, Carrie & Churchill A. Watson, Z. Bartlett, and Sallie K. Bartlett, and W. H. Jones, have five days from the date hereof in which to execute and file a new writ of error bond.

It is ordered, in this cause, that the def'ts have until the 1st day of March, 1877, in which to present their bills of exception in this cause for the signature of the judge and filing said bills in this court, and the time mentioned in Rule 33 of the court is, under the circumstances of this cause, extended until March 1st.

To the making of the order of March 1, 1877, by which the time (within which bills of exception may be signed by the judge presiding at the trial) was extended to March 1st, 1877, to cover the signing of certain bills of exception, numbered from 1 to 7, inclusive, presented by defendants' counsel February 28th, 1877, signed by the judge,
204 plaintiffs, by their counsel, in open court protested and excepted, upon the ground that by Rule 33 (Rules of Practice in Circuit Court, 5th Circuit, Western District of Texas), which is as follows: "Thirty-three. No bill of exceptions will be signed unless presented to the judge within five days after the close of the trial, unless further time be allowed by the court: Provided, That all bills of exceptions shall first be submitted to the opposing counsel, if he be in attendance at the term of the court," the time cannot, after the expiration of the time therein mentioned, be extended by the district judge so as to cover the signing of bills of exception contrary to said rule, no previous order of the court, or agreement of counsel in relation thereto, having been made.

These objections being overruled by the court, pl'ffs counsel then and there excepted and prayed that this bill of exceptions be signed and sealed and made part of the record, which is accordingly done.

March 1st, 1877.

[SEAL.] T. H. DUVAL, *U. S. Judge.*

205 Bond for writ of error, endorsed, to wit: "1552. Bailie Peyton et al. vs. W. S. Hunnicutt et al. Bond for writ of error Filed Feb. 24th, 1877. M. Hopkins, cl'k," which is in words as follows:

Supreme Court of the United States.

BAILIE PEYTON ET AL.
vs.
W. S. HUNNICUTT ET AL. } 1552.

Know all men by these presents that we, A. E. Watson, for himself, and as guardian for his minor children, Irene May, Carrie and Churchill A. Watson, Z. Bartlett, and Sallie K. Bartlett, and W'm H. Jones, all of the county of Falls, State of Texas, and C. Baker, T. G. Searcy, and R. F. Alexander, of the city of Austin, are held and firmly bound unto Bailie Peyton, Sallie B. Parker, Sarah H. Barry and her husband, Thomas Barry, Margaret Collier and her husband, Robert Collier, Kate H. S. Stewart and her husband, John W. Stewart, Joseph Bailie Peyton, Joseph B. Mathews, Charles Mathews, Celina Douglass and her husband, Seaton T. Douglass, Jessie Mathews, an infant, by Joseph B. Mathews, her next friend, and Clare Parker, Washington T.
206 Parker, and John R. Parker, infants, by Susan M. Parker, their mother and next friend, all of the State Tennessee; John C. Peyton, of Pennsylvania; and Clara I. O'Reilly, Julia Ernst, Eliza Jackson and her husband, James Jackson, of the State of Louisiana, in the sum of four thousand dollars, to be paid to the said obligees, their executors or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our

and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals, dated this 24th day of February, A. D. 1877.

Whereas the above-named A. E. Watson, in behalf of himself and his minor children, Irene May, Carrie and Churchill A. Watson, Z. Bartlett, and Sallie K. Bartlett, and W'm H. Jones, have prosecuted a writ of error to the Supreme Court of the United States to recover judgment rendered in the above-entitled action by the circuit court for the fifth circuit of the United States and western district of Texas:

Now, therefore, the condition of this obligation is such that if the above-bounden A. E. Watson, Z. Bartlett, Sallie K. Bartlett, and
207 W'm H. Jones, shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

A. E. WATSON, [L. S.]
For himself and as guardian for his children Irene May Watson, Carrie Amanda Watson, and Armistead Churchill Watson.

Z. BARTLETT, [L. S.]
By his Att'y, L. W. Goodrich.
SALLIE K. BARTLETT, [L. S.]
By her Att'y, L. W. GOODRICH,
W'M H. JONES, [L. S.]
By his Att'y, L. W. GOODRICH.
R. F. ALEXANDER. [L. S.]
C. BAKER. [L. S.]
I. G. SEARCY. [L. S.]

AUSTIN, *Feb'y 24th*, 1877.

The within bond having been examined, the same is hereby approved as good and sufficient.

T. H. DUVAL, *U. S. Judge.*

And afterwards the following bond was filed, endorsed, to wit: "No. 1552, Bailie Peyton et als. vs. W. S. Hunnicutt et als. Writ of error bond of Hunnicutt, Kelly & Barnes. Filed Feb. 27, 1877. M. Hopkins, cl'k"; which is as follows:

BAILIE PEYTON, SALLIE B. PARKER, Margaret Collier, and her husband Robert Collier, Kate H. Stewart, and her husband John W. Stewart, Joseph Bailie Peyton, Joseph B. Mathews, Charles Mathews, Celina Douglass, and her husband Seaton T. Douglass, Jessie Mathews (an infant), Clara Parker, Washington T. Parker, and John R. Parker, infants; all of whom are citizens of the State of Tennessee; John C. Peyton, a citizen of the State of Pennsylvania; Clara S. O'Rielly, Julia Ernst, Eliza Jackson, and her husband James Jackson, who are citizens of the State of Louisiana, and Thomas Barry, the husband, and John R. Barry, Locke W. Barry, David H. Barry, Jane Barry, and Peyton Barry, the children and only heirs at law of Sarah H. Barry, deceased, who are citizens of the State of Tennessee, plaintiffs,

vs.

W. S. HUNNICUTT, WILLIAM H. JONES, SARAH H. Bartlett, and her husband Zenas Bartlett, L. W. Kelley, G. W. Barnes, William Killibrew, William R. Reagan, Armistead E. Watson, Irene May Watson, Carrie Watson, and Churchill A. Watson, children of the
209 said Armistead E. Watson, and of his wife, Amanda Watson, deceased, and David Frasier, J. Q. Cockerell, T. R. Webb, Clement R. Johns, William Von Rosenberg, and Flavius Everett, all of whom are citizens and residents of the said State of Texas, and of the western district thereof, defendants.

Know all men by these presents that we, W. S. Hunnicutt, John W. Kelley, and George W. Barnes, three of the above-named defendants, and , of , are held and firmly bound unto Bailie Peyton, Sallie B. Peyton, Margaret Collier and her husband, Robert Collier, Kate H. Stewart and her husband, John W. Stewart, Joseph Bailie Peyton, Joseph B. Mathews, Charles Mathews, Celin Douglass and her husband, Seaton B. Douglass, Jessie Mathews, Clara Parker, Washington T. Parker, John R. Parker, John C. Peyton, Clara S. O'Rielley, Julia Ernst, Eleza Jackson and her husband, James Jackson, Thomas Barry, the husband, and John R. Barry, Locke W. Barry, David H. Barry, Jane Barry, & Peyton Barry, the children and only heirs at law of Sarah H. Barry,
210 deceased, in the sum of one thousand dollars, to be paid to the said Bailie Peyton, Sallie B. Peyton, Margaret Collier and her husband, Robert Collier, Kate H. Stewart and her husband, John W. Stewart, Joseph Bailie Peyton, Joseph B. Mathews, Charles Mathews, Celina Douglass and her husband Seaton T. Douglass, Jessee Mathews, Clara Parker, Washington T. Parker, John R. Parker, John C. Peyton, Clara S. O'Rielley, Julia Ernst, Eleza Jackson and her husband, James Jackson, Thomas Barry, the husband, and John R. Barry, Locke W. Barry, David H. Barry, Jane Barry, and Peyton Barry, the children and only

heirs at law, of Sarah H. Barry, deceased, all of whom are resident citizens of the State of Tennessee, except John C. Peyton, who is a resident citizen of the State of Pennsylvania, and Clara O'Rielley, Julia Ernst, Eleza Jackson and her husband, James Jackson, who are resident citizens of the State of Louisiana, their executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this the 27th day of February, A. D. 1877.

Whereas the above-named W. S. Hunnicutt, John W. Kelley, and
211 George W. Barnes have prosecuted a writ of error to the Supreme Court of the United States, to recover the judgment rendered in the above-entitled action by the circuit court of the United States, sitting at Austin, for the western district of Texas:

Now, therefore, the condition of this obligation is such that if the above-named W. S. Hunnicutt, John W. Kelley, and George W. Barnes shall prosecute their writ of error to effect, and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

W. S. HUNNICUTT. [SEAL.]
G. W. BARNES. [SEAL.]
L. W. KELLEY. [SEAL.]
C. BAKER. [SEAL.]
R. F. ALEXANDER. [SEAL.]

Witness:
J. P. HORBACH.
JOHN J. WHEADON.

Sealed & delivered in the presence of—

The foregoing bond is hereby approved this the 27th day of February, 1877.

T. H. DUVAL,
U. S. Judge.

STATE OF TEXAS,
County of Travis:

Before me, the undersigned authority, personally appeared W.
212 S. Hunnicutt, C. Baker, and R. F. Alexander, for themselves, at the same time appeared G. W. Barnes and L. W. Kelley, by their attorney in fact, W. S. Hunnicutt, to me made known, and the said parties for themselves, and the said parties by their attorney in fact, acknowledged that they executed the foregoing instrument of writing and declared the same to be their act and deed for the uses, purposes, and considerations therein expressed.

To certify which I hereto affix my hand and official seal in the city of Austin this 27th day of February, 1877.

[L. S.] H. B. BARNHART,
N. P., Travis County, Texas.

238.

And afterwards the following bond was filed, endorsed, to wit: "1552. Bond for writ of error. Filed March 1, 1877. M. Hopkins, cl'k;" which is in words following:

Supreme Court of the United States.

BAILIE PEYTON ET AL.
vs.
W. S. HUNNICUTT ET AL. } No. 1552.

213 Know all men by these presents that we, A. E. Watson, for himself and as guardian for his minor children Irene May, Carrie, and Churchill A. Watson, Z. Bartlett, and Sallie K. Bartlett, and W'm H. Jones, all of the county of Falls, State of Texas, and C. Baker, I. G. Searcy, and R. F. Alexander, of the city of Austin, are held and firmly bound unto Bailie Peyton, Sallie B. Parker, Margaret Collier, Robert Collier, Kate H. S. Stewart, John W. Stewart, Joseph Bailie Peyton, Joseph B. Matthews, Charles Matthews, Celina Douglass, Seaton Douglass, Jessee Mathews, an infant, Clare Parker, Washington T. Parker, John R. Parker, infants; John C. Peyton, Clara L. O'Reilley, Julia Ernst, Eliza Jackson, James Jackson, Thomas Barry, the husband, and John R. Barry, Locke W. Barry, David H. Barry, Jane Barry, and Peyton Barry, the children and only heirs at law of Sarah H. Barry, deceased, in the sum of four thousand dollars, to be paid to the said obligees, their executors or administrators, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this 24th day of February, A. D. 1877.

214 Whereas the above-named A. E. Watson, in behalf of himself and his minor children Irene May, Carrie, and Churchill A. Watson, Z. Bartlett, and Sallie K. Bartlett, and W'm H. Jones, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court for the fifth circuit of the United States and western district of Texas: Now, therefore, the condition of this obligation is such that if the above-bounden A. E. Watson, Z. Bartlett, Sallie K. Bartlett, & William H. Jones shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and virtue.

A. E. WATSON, [SEAL.]
By his att'y L. W. GOODRICH,
For himself and as guardian of his minor children Irene May, Carrie, and Churchill A. Watson.
Z. BARTLETT, [SEAL.]
By his att'y L. W. GOODRICH.
SALLIE K. BARTLETT, [SEAL.]
By *his* att'y L. W. GOODRICH.
W'M H. JONES, [SEAL.]
By his att'y L. W. GOODRICH.
I. G. SEARCY. [SEAL.]
P. DE CORDOVA. [SEAL.]
R. F. ALEXANDER. [SEAL.]
C. BAKER. [SEAL.]

Examined & approved.

T. H. DUVAL,
U. S. Judge.

215 Writ of error is endorsed, to wit: "In the Supreme Court of the United States. W. S. Hunnicut, G. W. Barnes, L. W. Kelly, A. E. Watson, for himself and as guardian for his minor children, Irene May, Carrie, and Churchill A. Watson, Sallie K. Bartlett, and her husband Z. Bartlett, and W. H. Jones, pl'ffs in error, vs. Balie Peyton, Sallie B. Parker, Margaret Collier and her husband Robert Collier, et al., def'ts in error. Writ of error. To Supreme Court of the United States. Issued 24 day of February, A. D. 1877. M. Hopkins, clerk." And is in words to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable judges of the circuit court of the United States, 5th circuit, in and for the western district of Texas, holding sessions at Austin, in said district, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court before you between Balie Peyton, Sallie B. Parker, Margaret Collier, and her husband Robert Collier, Kate H. S. Stewart, and her husband John W. Stewart, Joseph Balie Peyton, Joseph B. Matthews, Charles Matthews, Celina Douglass, and her husband Seaton T. Douglass, Jessie Matthews, an
216 infant, Clara Parker, Washington T. Parker, and John B. Parker, infants, John C. Peyton, Clara L. O. Reilly, Julia Ernst, Eliza Jackson, and her husband James Jackson, and Thomas Barry, the husband, and John R. Barry, Locke W. Barry, David H. Barry, Jame Barry, and Peyton Barry, the children and only heirs at law of Sarah H. Barry, dec'd, who are plaintiffs, and W. S. Hunnicut, William H. Jones, Sarah K. Bartlett, and her husband Zenas Bartlett, L. W. Kelly, G. W. Barnes, William Killebrew, William Reagan, Armistead E. Watson, and Irene May Watson, Carrie Watson, and Churchill A. Watson, children of the said Armistead E. Watson and his late wife, Amanda Watson, dec'd, David Frazier, J. Q. Cockrell, F. R. Webb, Clement R. Johns, William Von Rosenberg, and Flavius Everett, who are defendants (No. 1552 on the docket of said circuit court of the United States, sitting at Austin in said district), a manifest error hath happened, to the great damage of the said named def'd'ts, who are plaintiffs in error herein, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so
217 that you have the same at Washington on the second Monday of October next, in said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, chief justice of the Supreme Court, the 24th day of February, in the year of our Lord one thousand eight hundred and seventy-seven, and seal of our said circuit court, at

Austin, in the 101 year of the Independence of the United States of America.

[L. S.]

M. HOPKINS,
Clerk of the Circuit Court of the United States,
West. Dist. Texas, at Austin.

Allowed by—

T. H. DUVAL,
U. S. Judge.

NOTE BY THE CLERK.—When the writ of error and copy lodged was made out by the clerk, it was his impression that all of the def'ts designed joining in the writ of error, but it has been perfected only as to those defendants plaintiffs in error whose names appear on the reverse of this writ.

M. HOPKINS, *Clerk.*

218 Citation in error is endorsed, to wit: "In Supreme Court of the United States. W. S. Hunnicut, G. W. Barnes, L. W. Kelly, A. E. Watson, for himself and as guardian for his minor children, Irene May, Carrie, and Churchill A. Watson, Sallie K. Bartlett, and her husband Z. Bartlett, and W. H. Jones, plaintiffs in error, vs. Balie Peyton, Sallie B. Parker, Margaret Collier, and her husband Robert Collier, et al., def'ts in error. Citation in error issued 24th day of February, A. D. 1877. M. Hopkins, clerk," and in words to wit:

UNITED STATES OF AMERICA:

To Balie Peyton, Sallie B. Parker, Margaret Collier, and her husband Robert Collier, Kate H. S. Stewart, and her husband John W. Stewart, Joseph Balie Peyton, Joseph B. Matthews, Charles Matthews, Celina Douglass, and her husband Seaton T. Douglass, Jessie Matthews, and infant Clare Parker, Washington T. Parker, and John R. Parker, infants John C. Peyton, Clare L. O'Riely, Julia Ernst, Eliza Jackson, and her husband James Jackson, and Thomas Barry, the husband, and John R. Barry, Locke W. Barry, David H. Barry, Jane Barry, and Peyton Barry, the children and only heirs at law of Sarah H. Barry, dec'd, or their attorneys of record, Mess'rs Peeler, Montgomery & Fisher, greeting:

219 You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Texas, 5th circuit, sitting at Austin, wherein W. S. Hunnicut, William H. Jones, Sarah K. Bartlett, L. W. Kelly, G. W. Barnes, William Killebrew, William R. Reagan, Armistead E. Watson, and Irene May Watson, Carrie Watson, and Churchill A. Watson, children of the said Armistead E. Watson, and his late wife Amanda Watson, dec'd, David Brazier, J. G. Cockrell, F. R. Webb, Clement R. Johns, William Von Rosenberg, and Flavius Everett, who are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Cheif Justice of the said Supreme Court of the United States, this 24 day of February, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.]

T. H. DUVAL,
U. S. Judge

Test, with seal of court, at Austin, this 24 day of February, A. D. 1877.

M. HOPKINS, *Clerk.*

220 NOTE BY THE CLERK.—When the citations were issued the clerk supposed the whole of the defendants designed to join in the writ of error, but the appeal has only been perfected for those defendants whose names are endorsed on the reverse of this writ and who are the pl'ffs in error.

M. HOPKINS, *Clerk*

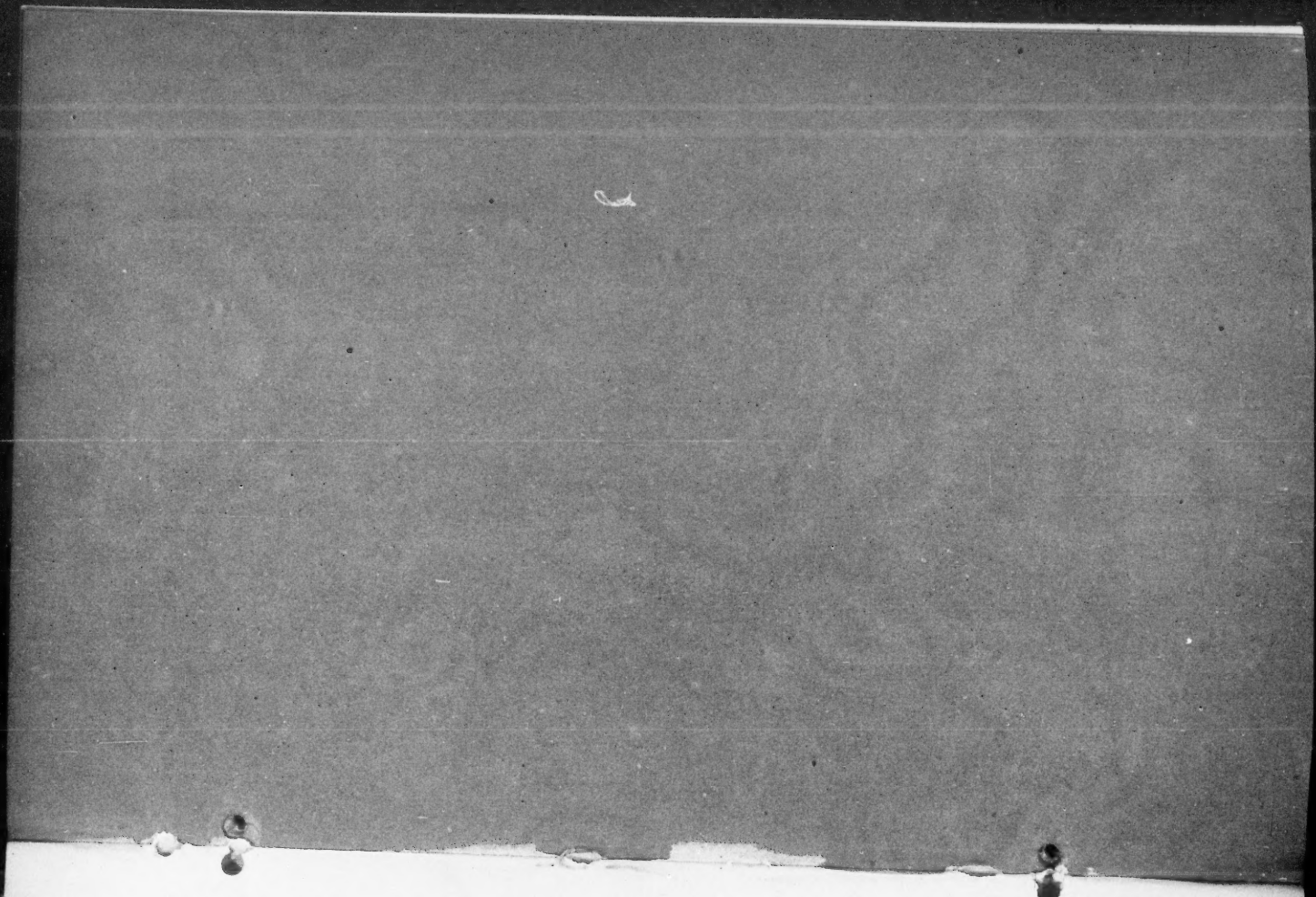
The marshal's return is in words to wit:

Rec'd in office this 3rd day of September, and served the same day at Austin, Texas, by delivering to A. J. Peeler, attorney of record for def'ts in error, in person, a true copy of this writ.

THOMAS F. PURNELL,
U. S. Marshal W. D. Texas,
By E. HUPPERTY,
Deputy.

I, Matthew Hopkins, clerk of the circuit court of the United States, 5th circuit, in and for the western district of Texas, at Austin, certify that the foregoing two hundred and twenty pages in writing contain a full and true transcript of the record and all the proceedings had, as they appear of file and record in this court in cause No. 1552, entitled Balie Peyton et al. versus W. S. Hunnicut et als.

In testimony whereof I have hereunto set my hand and the impress of the seal of said court, at Austin, this 19th day of September, A. D. 1877.

[SEAL.] M. HOPKINS, *Clk.*

(Indorsement on cover:) No. 809. W. S. Hunnicut, G. W. Barnes et al., plaintiffs in error, v. Balie Peyton, Sallie B. Parker, et al. W. Texas, C. C. U. S. Filed 5th October, 1877.